140 U.S. 5-35

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 762. 343

MARY BARDON, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED MARCH 27, 1889.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print
Caption	1	1
Order to docket cause on removal	1	1
Transcript from State court	2	1
Summons	3	1
Proof of service of summons	4	1
Bill of complaint	5	2
Answer	26	7
Petition for removal	44	11
Bond for removal	49	12
Amended bill of complaint	55	13
Answer	75	24
Exhibit A—Letter of Commissioner of General Land Office to register and receiver at Bayfield, Wis., November 28, 1882	86	30
Replication	89	31
Stipulation as to facts	90	32
Exhibit A—Certified copies of the pre-emption cash-entry papers No. 429 of the heirs of James Robinson, Jr., &c.	103	39
C—Letter of Commissioner of General Land Office to register and receiver, Bayfield, Wis., Nov. 8, 1862	105	40
D—Letter of D. A. Baldwin to Commissioner General Land Office, May 5, 1865	106	41
Proceedings of executive committee St. C. and L. S. R. R. Co., April 22, 1865	107	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1890.

	Original.	Print.
Exhibit E—Letter Commissioner General Land Office to D. A. Baldwin, May 10, 1865	108	42
F—Letter Commissioner General Land Office to register and receiver, Bayfield, Wis., December 10, 1869	109	42
H—Letter W. K. Mendenhall to Commissioner General Land Office, March 27, 1883	111	43
I—Letter W. K. Mendenhall to Commissioner General Land Office, July 3, 1883	112	44
Letter of Edwin H. Abbott to Commissioner General Land Office, July 2, 1883	113	44
J—Letter Commissioner General Land Office to register and receiver, Bayfield, Wis., July 12, 1883	113	45
N—Certified copies of the homestead-entry papers No. 47 of Owen Sheridan, &c.	115	46
O—Certified copy of declaratory statement No. 654 of Mary Bardon, &c.	117	47
P—Certified copies of pre-emption cash-entry papers No. 3698 of Mary Bardon, &c.	119	48
R—Letter of Commissioner General Land Office to register and receiver at Bayfield, Wis., Nov. 28, 1883	124	51
T—Letter of Secretary of Interior to Commissioner of General Land Office, August 10, 1886	127	52
Decree	129	53
Petition for appeal	134	54
Order allowing appeal	140	55
Bond on appeal	141	55
Clerk's certificate	146	57
Citation	148	57
Proof of service of citation	149	58

1 UNITED STATES OF AMERICA, } ss:
Western District of Wisconsin, }

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the first Tuesday (being the 4th day) of December, A. D. 1888—present and presiding, the Honorable Romanzo Bunn, United States district judge—among other the following proceedings were had, to wit:

NORTHERN PACIFIC RAILROAD COMPANY }
vs. }
MARY BARDON. }

2 Be it remembered that heretofore, to wit, on the 22d day of April, A. D. 1887, came the plaintiff herein and filed in this court a transcript of the record and proceedings in this case in the circuit court of the State of Wisconsin for Douglas county, and, on motion of the plaintiff, it is ordered that said cause be docketed in this court and be proceeded with as provided in the acts of Congress in relation to removal of cases from the State court.

The following is a copy of said transcript of the record and proceedings in said cause certified by the clerk of the circuit court for said Douglas county:

3 Circuit Court, Douglas County.

NORTHERN PACIFIC RAILROAD COMPANY }
vs. }
MARY BARDON. }

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint.

C. L. CATLIN,
Plaintiff's Attorney.

P. O.: Superior, Douglas Co., Wisconsin.

4 (Endorsed:) Filed Dec. 13, 1886. Chas. Lord, clerk.

STATE OF WISCONSIN, } ss:
Douglas County, }

Jason D. Clark, being first sworn, says that on the 13th day of December, A. D. 1886, at Superior, in said county of Douglas, he served the within summons on the within-named defendant, Mary Bardon, personally by delivering to and leaving with said defendant a true copy thereof; and affiant further says that he knows the said

person so served to be the same Mary Bardon named as defendant in said summons.

JASON D. CLARK.

Sworn to and subscribed before me this 13th day of Dec., A. D. 1886.

HENRY S. BUTLER,
Notary Public.

5 STATE OF WISCONSIN, }
Douglas County. }

Circuit Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs.
MARY BARDON, Defendant. }

1st.

The plaintiff is a corporation duly organized and existing under that certain act of Congress, approved July, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter.

6 2d.

In and by sections three, four, and six of the said act of July 2d, 1864, it was enacted and provided as follows—that is to say:

"SEC. 3. And be it further enacted That there be and hereby is, granted to the Northern Pacific Railroad Company its sucessors and assigns for the purpose of aiding in the construction of said railroad telegraph line to the Pacific coast and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public lands, not mineral, designated by odd num-
7 bers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office and whenever prior to said time any of said sections or parts
8 of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits

of said alternate sections: Provided that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further
9 that the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company or may consolidate, confederate and associate with said company upon the terms named in the first section of this act: Provided further that all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected as above provided: And provided further that the word mineral where it occurs in this act shall not be held to in-
10 clude iron or coal: And provided further that no money shall be drawn from the Treasury of the United States to aid in the construction of said Northern Pacific railroad.

"SECTION 4. And be it further enacted that whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the
11 United States and patents of lands as aforesaid shall be issued to said company, confirming to said company the rights and title to said lands situated opposite and coterminous with said completed section of said road, and from time to time whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States then patents shall be issued to said company conveying the additional sections of land as aforesaid and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided that no more than ten
12 sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided also, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof constructed at the date of the passage of this act."

"SEC. 6. And be it further enacted that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the center line of said road, after the general route
13 shall be fixed, and as fast as may be required by the construc-

tion of said road, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they surveyed, except by said company as provided in this act; but the provisions of the act of September eighteen hundred and forty-one granting pre-emption rights and the acts amendatory thereof, and of the acts entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty eighteen hundred and sixty-two be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company, and the reserved alternate sections
14 shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale.

3d.

After the passage of the said act of Congress and the acceptance thereof by the said Northern Pacific Railroad Company, and after the organization of the said Northern Pacific Railroad Company thereunder, to wit, on August 13th, A. D. 1870, the said Northern Pacific Railroad Company duly made out a map or diagram showing the general route of all that part of the line of railroad authorized to be constructed by the said acts and joint resolutions which lies within the State of Wisconsin, and on that day duly filed the same in office of the Secretary of Interior of the United
15 States, to wit, in the office of Commissioner of the General Land Office of the United States. Afterwards, to wit, on September 15th, A. D. 1870, the Commissioner of the said General Land Office duly made out and transmitted to the register and receiver of the land office of the United States at Bayfield, Wisconsin, the same then and still being the land office of the United States for the land district in which the parcel of land hereinafter particularly described is situated, a copy of the said map or diagram of the said general route, together with a letter of instructions addressed to the said register and receiver, which was in terms following—that is to say:

DEPARTMENT OF THE INTERIOR,
16 GENERAL LAND OFFICE, *September 15th*, 1870.

Register and receiver, Bayfield, Wis.

GENTLEMEN: "I transmit here a diagram showing the designated route of the Northern Pacific railroad under act July 1864, and by direction of the Secretary of the Interior you are requested to withhold from sale or location, pre-emption or homestead entry all the odd number of sections of public lands falling within the limits of twenty miles as designated on this map.

"You will also increase price to $2.50 per acre, the even-numbered sections within these limits and dispose of them at that ratability under the pre-emption homestead laws only. No
17 private entry of the same being admissable until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by you,

and you are requested to acknowledge without delay the time of its receipt.

"Very respectfully, JOS. S. WILSON,
"*Commissioner.*"

The said map or diagram and the said letter of instructions accompanying the same were received by the said register & receiver by due course of mail after the transmission thereof as aforesaid and prior to October 1st, 1870. Afterwards, to wit, on July 6, 1882, the said Northern Pacific Railroad Company duly made out and
18 filed in the office of the Secretary of the Interior of the United States, to wit, in the office of the Commissioner of the General Land Office of the United States, a further map or plan showing the line of definite location by the said railroad company of all that part of its said line of railroad lying within the State of Wisconsin, which definite location, prior to the last-mentioned date and within the same year, had actually been made by the said railroad company upon the ground.

After the filing of the said map of definite location and prior to September 18th, 1882, the plaintiff had duly constituted and completed in all respects as provided by the said act of Congress a
19 continuous section of its said railroad within the said line of definite location and along and opposite to the parcel of land hereinafter particularly described, which section of said railroad was 25 miles and upwards in length and extended for a distance of several miles both to the eastwardly and to the westwardly of the said parcel of land.

After the construction and completion of the said section of railroad as aforesaid, to wit, on September 18th, 1882, the President of the United States duly accepted the said section of railroad as having been in all respects constructed and completed as required by the said acts and joint resolutions of Congress.

20 That certain parcels of land situated in the county and State aforesaid, to wit, the northeast quarter of section number thirty-three, in town numbered forty-nine, of range numbered fourteen west, is wholly situated within the distance of twenty miles from the line of the said general route and wholly within the same distance from the line of the said definitely located and constructed railroad, and the said parcel of land, at the time of the filing of the said map of general route in the office of the Secretary of the Interior and at the time of the issuance of the letters of instruction from the Commissioner of the General Land Office to the
21 register and receiver of the Bayfield land district, hereinbefore quoted, formed parcel of the public lands of the United States to which the United States then had full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emptions and other claims or rights, but the same continued to be public lands of the United States not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions and other claims or rights save the right of this company thereto under the said acts and joint resolutions of Congress, until the wrong-

ful act of the defendant hereinafter stated. After the filing of the said maps of general route and after the issuance and
22 receipt by the register and receiver of the said Bayfield land office of the said letters of instruction and while the withdrawal of the said parcel of land effected by the filing of the said map of general route and by the issuance of the said letters of instructions remained in full force, to wit, on June 20, A. D. 1882, the defendant, Mary Bardon, wrongfully and with out authority of law procured to be issued to her by the register and receiver of the said Bayfield land district an instrument in writing purporting to be a final receipt for the sum of two hundred dollars paid by the defendant to the said receiver as the price of the said parcel of
23 land upon the pre-emption entry by the defendant thereof under the laws of the United States relating to the pre-emption of public lands. After the issuance to her of the said receipt, to wit, on July 29, A. D. 1882, the defendant caused the said receipt to be recorded in the office of the register of deeds in and for the said county of Douglas, where the same still remains of record.

6th.

The plaintiff is ignorent as to whether the defendant has ever procured from the Government of the United States a patent purporting to convey to her the said parcel of land.

24 7th.

The said final certificate and the record thereof constitute a cloud upon the title of the plaintiff to the parcel of land hereinbefore described which prevents the sale thereof by the plaintiff and greatly impairs the value thereof.

8th.

The value of the said parcel of land is the sum of eight thousand dollars and upwards.

Wherefore the plaintiff prays the decree of the court adjudging the plaintiff to be the owner of the said parcel of land in law and in equity, and annulling and cancelling the said final receipt and
25 the record thereof, and forever enjoining the defendant and all persons claiming under or through her from procuring the issuance of a patent based upon the said certificate and her said pre-emption entry of the said tract of land, and for such other and further relief as to the court may seem equitable and just in .the premises.

C. L. CATLIN,
Att'y for Plaintiff, Superior, Wis.

(Endorsed :) Filed December 13, 1886. Chas. Lord, clerk.

26 STATE OF WISCONSIN, }
Douglas County. }

Circuit Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs. }
MARY BARDON, Defendant. }

1.

The defendant, answering the complaint of the plaintiff in the above-entitled action, admits the allegations of the plaintiff's complaint contained in the 1st, 2d, & 3d paragraphs or subdivisions.

2.

The defendant, further answering, admits that the tract of
27 land in said complaint described is wholly situated within the distance of twenty miles from the line of said general route and wholly within the same distance of the line of the plaintiff's definitely located and constructed railroad, as alleged in the complaint; but the defendant denies that the said parcel of land at the time of the filing of said map of the general route in the office of the Secretary of the Interior, or at the time of the issuance of the letters of instruction from the Commissioner of the General Land Office to the register and receiver of the Bayfield land district, or during any time intermediate, formed a parcel of the public lands of the United States to which the United States then had full
28 or any title, and avers that *that* the same had then been sold, granted, and appropriated and was then and during all said time subject to pre-emption and other claims and rights and had not been any portion of the public lands of the United States at any of the times above designated free from pre-emptions or other claims or rights, and avers that the same was not included in the said grant to the plaintiff, and that no right thereto ever attached in favor of the plaintiff, as alleged in the plaintiff's complaint, or otherwise.

The defendant, *for* further answering, avers that the said tract and parcel of land in said complaint described and all the public lands of the United States in the State of Wisconsin lying
29 within twenty miles of the line of the definite location and constructed road of the plaintiff was surveyed long prior to said grant to the plaintiff and was subject to sale by pre-emption on and prior to the 12th day of September, A. D. 1855, and that on that day one James Robinson, Jr., did make a pre-emption settlement thereon as provided by law, and thereafterwards and — the 30th day of July, 1857, did make his final proofs before the proper officers of the land office of his settlement, improvements, and qualifications to enter said land under the pre-emption laws, and did thereupon and on that day purchase the same by pre-emption and pay to the said United States, as provided by law,
30 and retained and held the right to the title so vested in him from that date until the 5th day of August, 1885, when,

upon grounds to this defendant unknown, the department refunded the purchase-money so paid for said land to said James Robinson, Jr., and cancelled and set aside said pre-emption entry and sale, and again, on the 17th day of December, 1871, sold the same to one Owen Sheridan for cash, as provided by law, and thereafterwards and prior to Jan'y 5, 1881, for some cause to the defendant unknown, cancelled said entry and sale.

The defendant, further answering, alleges that heretofore, on
31 the 3d day of June, 1856, the Congress of the United States, by an act granting public lands to the State of Wisconsin to aid in the construction of railroads in that State, did grant to the State of Wisconsin, for the purpose to aid in the construction of a railroad from Madison or Columbus by the way of Portage City to the St. Croix river or lake, between township- twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively, with a condition that if, when the lines or routes of said roads are defi-
32 nitely fixed, the United States have sold any sections or parts thereof or the right of pre-emption had attached to the same that the State should select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the right of pre-emption —, which lands so selected should be held by the State for the use and purposes above specified; which grant was thereafterwards duly accepted by the State of Wisconsin and duly granted to the
33 St. Croix and Lake Superior Railroad Company, so far as the grant pertained to a line of road from Lake St. Croix to Lake Superior, by an act of the Legislature of Wisconsin passed and approved on the 24th day of February, 1854, entitled "An act to incorporate the St. Croix and Lake Superior Railroad Company," and by an amendment to said act passed and approved on the 5th day of March, 1857, by the Legislature of Wisconsin, entitled "An act to amend an act entitled 'An act to incorporate the St. Croix and Lake Superior Railroad Company,'" approved Feb'y 24th, 1854; and the defendant avers said tract of land in the plaintiff's com-
34 plaint described was within six miles of the line of road definitely located by the St. Croix and Lake Superior Railroad Company, which company definitely located its line of road and filed its maps of the same with the Secretary of the Interior on the 5th day of November, A. D. 1857, and that said corporation and its successors in interest have since *have* fully constructed and equipped said road, and the same has been duly accepted by the Department of the Interior and the United States.

The defendant, further answering, avers that on the 5th day of May, 1864, the Congress of the United States passed an act entitled An act granting lands to aid in the construction of *entitled*
35 *An act granting lands to aid in the construction of* certain rail-

roads in the State of Wisconsin, approved May 5th, 1864, and thereafterwards, on the 9th day of April, 1866, did pass an act entitled An act to incorporate the Portage and Superior Railroad Company and to execute the trust created by an act of Congress entitled An act granting lands to aid in the construction of certain railroads in the State of Wisconsin, approved May 5, 1864, and avers that both of said corporations were duly organized and under and by virtue of certain provisions in the acts aforesaid were duly consolidated into a *a* corporation by the name of Portage, Winnebago and Superior Railroad Company, and avers that all the rights to
36 lands granted in and by said acts of Congress to the State of Wisconsin pertaining to the lines designated and described in the aforesaid acts of the Legislature of Wisconsin were granted to said corporation and its successors, and avers that under and by virtue of said acts and the powers vested in said corporation by said act, the acts supplementary thereto and amendatory thereof, said lines of road have been constructed, and avers that the Portage, Wisconsin and Superior Railroad Company definitely fixed its route, as required by the said acts of Congress, and filed maps thereof with the Secretary of the Department of the Interior and the Commissioner
37 of the General Land Office on the 7th day of September, 1869, and avers that the tract and parcel of land described in the plaintiff's complaint was within ten miles of said railroad as definitely fixed and described upon said map; and the defendant avers that the Legislature of the State of Wisconsin, on the 4th day of February, 1871, passed an act to change the name of the Portage, Winnebago and Superior Railroad Company, whereby the name of said company was changed to the Wisconsin Central Railroad Company, and vested, among other things, with all the rights, powers, privileges, trusts, property, and franchises which had been conferred or
38 acquired by the railroad companies consolidated by filing articles with the secretary of state on May 24, 1864.

3d.

The defendant, further answering, avers that on Jan'y 25, A. D. 1881, said tract of land described in the complaint then being a portion of the public lands of the United States not included in any grant nor reserved for any purpose, and being subject to entry and sale by pre-emption, the defendant entered upon and made a settlement upon the same, and being qualified as a pre-emptor and having resided and made improvements thereon from that date until June 22, 1882, after having given due notice
39 to all adverse claimants to said land to appear before the register and receiver of the United States land office at Bayfield, Wisconsin, and contest her rights to enter said tract by pre-emption, did on that day proceed to introduce proof before said officers in support of her right to enter the same by pre-emption, and the Chicago, St. Paul, Minneapolis and Omaha Company, as successors to the St. Croix and Lake Superior Railroad Company and the Portage, Winnebago and Superior Railroad Company, did appear at the time and place aforesaid before said officers and con-

test the right of the defendant to enter said land by pre-
40 emption, and, after a full and fair hearing of all the evidence and arguments of counsel, the said officers did decide and determine that the defendant have the legal right to enter and pay for said land by pre-emption, and thereupon she lawfully and rightfully purchased and paid for the same from the United States; and the defendant avers that after said hearing and determination the plaintiff in this action appeared in said case and took an appeal from the decision of the register and receiver aforesaid to the Commissioner of the General Land Office, who, after a full and fair hearing both of the plaintiff and defendant, conducted in all respects according to the rules and regulations of the
41 General Land Office, did, on the 28th day of November, 1883, confirm the decision of the register and receiver and duly approved of the cash entry thereof made by the defendant, subject to appeal by the Northern Pacific Railroad Company to the Secretary of the Interior; and thereupon the said Northern Pacific Railroad Company did appeal to the Secretary of the Interior from said decision of the Commissioner of the General Land Office, in accordance with the rules and practice of said Department, and, after a full & fair hearing and argument made in behalf of the plaintiff and the defendant, the acting Secretary of the Interior, Hon. N.
42 L. Muldrum, did, on the 10th day of August, 1886, confirm the said decision of the Commissioner of the General Land Office and of the register and receiver, holding said cash entry of the defendant for approval and patent.

4th.

The defendant, further answering, avers that on the 21st day of April, 1875, the Congress of the United States passed an act to confirm pre-emption or homestead entries of public lands within the limits of said routes — grants in cases where such entries have been made under the regulations of the Land Department, whereby, among other things, it was provided that pre-emption and homestead entries made by permission of the Land Department within the limits
43 of any land grant at a time subsequent to the expiration of such grants shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor, and avers that the time of the expiration of the said grant to the plaintiff expired on the 4th day of July, A. D. 1880.

Wherefore the defendant demands judgment that the plaintiff take nothing by this action, and for her costs.

E. L. JOHNSON,
Att'y for Def't.

JOHN B. & W. H. SANBORN,
Of Counsel.

(Endorsed:) Filed Jan'y 11, 1887. S. E. Tubbs, clerk.

44 STATE OF WISCONSIN, }
County of Douglas. }

Circuit Court.

NORTHERN PACIFIC RAILROAD COMPANY }
vs. }
MARY BARDON. }

Petition for Removal to United States Court.

To the honorable the court aforesaid:

The Northern Pacific Railroad Company, the plaintiff in the above-entitled cause, respectfully shows it that it is a corporation organized and existing under the laws of the United States of America, to wit, that certain act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construc-
45 tion of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route," and the several subsequent acts and joint resolutions of Congress relating to the same subject-matter; that the above-entitled action has been commenced and is yet pending in this court; that the date of the commencement of this action was December 13th, A. D. 1886; that the term of this court beginning on the 4th Monday in June, A. D. 1887, is the first term at which the said suit could be tried, and the same has not yet been tried; that the amount in dispute in the said suit exceeds the sum of five hundred dollars,
46 exclusive of costs, as will more fully appear by reference to the complaint therein, and that by reason of the premises the petitioner is entitled, under the act of Congress for such cases made and provided, to remove the said suit into the circuit court of the United States for the western district of Wisconsin for further proceedings therein, and to that end herewith is tendered to this court proper and sufficient surity for the doing by it of the several things required by the said acts to be done upon the removal of a cause from a State court into a United States court.

Wherefore your petitioner prays that the said surety may
47 be accepted, and that this court proceed no further with said cause, and that the same be transmitted to the circuit court of the United States for further proceedings therein.

Dated January 14th, A. D. 1887.

C. L. CATLIN,
Att'y for Petitioner, Superior, Wis.

W. P. CLOUGH, *Of Counsel.*

STATE OF WISCONSIN, } *ss:*
Douglas County, }

Personally came before me the undersigned, C. L. Catlin, attorney for the petitioner, with the foregoing petition, and, having been by me first duly sworn, did depose and say that the several alle-
48 gations of the foregoing petition are true to the best of his knowledge, information, and belief.

C. L. CATLIN.

Subscribed and sworn to before me on this first day of March, 1887.

HENRY S. BUTLER,
[SEAL.] *Notary Public, Douglas County, Wisconsin.*

(Endorsed :) Filed March 4, 1887. S. E. Tubbs, clerk.

49 STATE OF WISCONSIN, }
County of Douglas. }

Circuit Court.

NORTHERN PACIFIC RAILROAD COMPANY }
vs. }
MARY BARDON. }

Bond on Removal to United States Court.

Know all men by these presents that we, Dennis Dean and Niel Smith, of Superior, in the county of Douglas and State of Wisconsin, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Mary Bardon, the defendant in the above-entitled suit, in the penal sum of five hundred dollars, lawful
50 money of the United States; for the payment, well and truly to be made, we bind ourselves and our executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated on the first day of March, 1887.

Whereas the said Northern Pacific Railroad Company has filed its petition in the court aforesaid, praying for the removal into the circuit court *for* the United States for the western district of Wisconsin of the above-entitled suit under and by virtue of the acts of Congress for such cases made and provided :

Now, therefore, if the said Northern Pacific Railroad Com-
51 pany shall enter in the circuit court of the United States for the western district of Wisconsin on the first day of its next session hereafter copy of the record in the suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, in such case the above-written obligation to be void; but otherwise to remain of full force and virtue.

DENNIS DEAN. [SEAL.]
NEIL SMITH. [SEAL.]

Signed, sealed, and delivered in presence of—
A. W. FURBASH &
H. S. BUTLER.

STATE OF WISCONSIN, }
County of Douglas. }

52 Personally came this day before the undersigned, a notary public in and for the said county, Dennis Dean and Neil Smith, the same persons who signed and sealed the foregoing instru-

ment, and they acknowledged that they executed the same as their free act and deed.

Dated March 1, 1887.

H. S. BUTLER,
[SEAL.] *Notary Public, Douglas Co., Wis.*

STATE OF WISCONSIN, } ss:
County of Douglas, }

Personally came before me the undersigned Dennis Dean and Neil Smith, the same persons who signed and sealed the fore-
53 going instrument, and, each having been first —, did depose and say that he is a resident and freeholder of this State and worth the sum of five hundred dollars above debts, liabilities, and property exempt from levy and sale under execution.

DENNIS DEAN.
NEIL SMITH.

Subscribed and sworn to before me this 1st day of March, A. D. 1887.

H. S. BUTLER,
[SEAL.] *Notary Public, Douglas County, Wis.*

(Endorsed:) Filed M'ch 4, 1887. S. E. Tubbs, cl'k.

The within bond is approved and accepted March 2, 1887.

S. H. CLOUGH,
Judge Circuit Court.

54 On this day, to wit, the 6th day of June, A. D. 1888, said plaintiff and said defendant filed in the office of the clerk — circuit court for western district of Wisconsin, where said cause was then pending, an amended bill of complaint, answer, and replication; also stipulation of the parties relating to the evidence in the case; which said bill, answer, replication, and stipulation are in the words & figures following, to wit:

55 United States Circuit Court, Western District of Wisconsin.
In Equity.

To the honorable the judges of the circuit court of the United States for the western district of Wisconsin:

The Northern Pacific Railroad Company, a corporation duly organized and existing under and by virtue of that certain act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route," and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter, having its principal places of business in the State of New York, in the city of New York therein; in the State of Minnesota, in the city of St. Paul therein, brings this its amended bill against Mary Bardon, a citizen

of the State of Wisconsin and a resident of the county of Douglas therein; and thereupon your orator complains and says:

In and by said act of Congress of July 2, 1864, your orator was authorized and empowered to lay out, locate, construct, fur-
56 nish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by your orator, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon; and was thereby vested with the powers, privileges, and immunities necessary to carry into effect the purposes of said act as therein set forth.

For the purpose of aiding in the construction of said railroad and telegraph line as aforesaid Congress did, in and by said act, grant to your orator every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as your orator should adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passed through any State and whenever on the line thereof the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, that portion of said act making such grant being in the words following:

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of
57 said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

In and by said act of July 2, 1864, it was further enacted and provided as follows—that is to say:

"SEC. 4. And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall

appear that twenty-five consecutive miles of said railroad and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of land, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with, said completed sections of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company
58 for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by the said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

After the passage of the said act of Congress and the acceptance thereof by your orator, and after the organization of your orator thereunder, to wit, on March 6, A. D. 1865, your orator duly made out a map, plat, or diagram showing the general route of all that part or portion of said line of railroad authorized to be constructed by the said acts and joint resolutions which lies within the State of Wisconsin, and on that day filed the same in the office of the Secretary of the Interior and requested that the same might be filed in the office of the Commissioner of the General Land Office, and that the lands granted to your orator as aforesaid be marked and withdrawn from sale or entry.

59 Afterwards, to wit, on March 9, A. D. 1865, the Secretary of the Interior duly transmitted said map or plat and caused

the same to be, and the same was, duly delivered to the Commissioner of the General Land Office, together with a letter of instructions to said Commissioner of the General Land Office, which was in the following form and words, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., *March* 9, 1865.

"SIR: Herewith I transmit a map upon which the 'general line' of the Northern Pacific railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market.

"In view of the provisions of the third and sixth sections of the act of Congress approved July 2, 1864 (pamphlet laws, pages 268–269), should you perceive no objections, I think that the odd-numbered sections along the line, for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad.

"The even-numbered sections along the line will be, however, subject to disposal by the United States, as provided in the sixth section of said act of Congress.

"Very respectfully, your obedient servant,
J. P. USHER, *Secretary.*

"The Commissioner of the General Land Office."

Afterwards, to wit, on Aug. 13, A. D. 1870, your orator duly made out a second map or diagram, showing the general route of all that part of the said line of railroad authorized to be constructed by said acts and joint resolutions, which lies within the State of Wisconsin, and on that day duly filed the same in the office of
60 the Secretary of the Interior of the United States, to wit, in the office of the Commissioner of the General Land Office of the United States.

Afterwards, to wit, on Sept. 15, A. D. 1870, the said Commissioner of the General Land Office duly made out and transmitted to the register and receiver of the local land office of the United States at Bayfield, Wisconsin, the same then and still being the land office of the United States for the land district in which the parcel of land hereinafter described is situated, a copy of said second map or diagram of the said general route, together with a letter of instructions addressed to the said register and receiver, which was in terms following—that is to say:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Sept.* 15, 1870.

"Register and receiver, Bayfield, Wis.

"GENTLEMEN: I transmit herewith a diagram, showing you the designated route of the Northern Pacific railroad under act July 2,

1864, and by direction of the Secretary of the Interior you are requested to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections of public lands falling within the limits of twenty miles, as designated on the map.

"You will also increase in price to $2.50 per acre, even-numbered sections within those limits, and dispose of them at that ratability, under the pre-emption and homestead laws only, no private entry of the same being admissable until these lands have been offered at the increased price.

61 "This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

"Very respectfully, JOS. S. WILSON,
"*Commissioner.*"

The said second map or diagram and the said letter of instructions accompanying the same were received by the said register and receiver by due course of mail, after the transmission thereof as aforesaid, and prior to Oct. 1, A. D. 1870.

Afterwards, to wit, on July 6, A. D. 1882, your orator duly made out and filed in the office of the Secretary of the Interior of the United States, to wit, in the office of the Commissioner of the General Land Office of the United States, a third map or diagram, showing the line of definite location by your orator of all that part of your orator's said line of railroad which lies within the State of Wisconsin, which definite location, prior to the last-mentioned date and within the same year, had actually been made by your orator upon the ground.

After the filing of said map of definite location, and prior to Sept. 18, A. D. 1882, your orator had duly constructed and completed, in all respects as provided by the said acts of Congress, a continuous section of its said railroad within said State of Wisconsin and along said line of definite location and along and opposite to the parcel of land hereinafter described, which section of railroad was twenty-five (25) miles and upwards in length and extended for a distance of several miles both to the eastward and the westward of the said parcel of land.

62 After the construction and completion of the said section of railroad as aforesaid, to wit, on Sept. 18, 1882, the President of the United States duly accepted the said section of railroad as having been in all respects constructed and completed as required by the said acts and joint resolutions of Congress.

That certain parcel of land situated in the said county of Douglas and State of Wisconsin, to wit, the northeast quarter of section numbered thirty-three (33), in township numbered forty-nine (49), of range numbered fourteen (14) west, is wholly within the distance of twenty miles from the line of the said general route as fixed by the first and second maps or diagrams hereinbefore mentioned, and is wholly within the distance of twenty miles from the line of definite location of said railroad as fixed by said third map or diagram here-

inbefore mentioned, and is wholly within the distance of twenty miles from the line of railroad of your orator, constructed and completed as aforesaid, and is within the designated limits of the withdrawal made by the Commissioner of the General Land Office as aforesaid, at the time of the filing of the second map or diagram hereinbefore mentioned and at the times of the filing of said first map or diagram and of said second map or diagram, to wit, on March 6, 1865, and on Aug. 13, 1870, and at all times between said last-mentioned dates, and up to Jan. 25, 1881, was vacant and unoccupied and not in the possession of any one whatsoever; and is of great value, to wit, of the value of eight thousand dollars ($8,000).

63 Notwithstanding the premises, the said register and receiver of the said land office at said Bayfield did, on Jan. 25, 1881, wrongfully and unlawfully permit the said defendant, Mary Bardon, to file in said office her declaration of settlement on said parcel of land under the pre-emption laws of the United States, and on said last-mentioned date the said defendant did wrongfully and unlawfully file in said land office her declaration of settlement on said parcel of land under said pre-emption laws; and afterwards, to wit, on June 22, A. D. 1882, the said defendant did wrongfully and unlawfully procure to be issued to her by the said register and receiver of the said Bayfield land district an instrument in writing purporting to be a final receipt for the sum of two hundred dollars ($200), paid by the defendant to the said receiver as the price the said parcel of land, upon the pre-emption entry thereof by the said defendant as aforesaid. Afterwards, to wit, on July 29, A. D. 1882, the said defendant caused the said receipt to be and the same was recorded in the office of the register of deeds in and for said county of Douglas, where the same still remains of record. Afterwards, to wit, in January, A. D. 1887, the said defendant wrongfully and unlawfully caused to be issued to her another second instrument in writing, purporting to be a patent from the United States, conveying said parcel of land to said defendant; and afterwards, to wit, on —, A. D. 1887, the said defendant caused the said patent to be and the same was recorded in the office of said register of deeds in and for said county of Douglas, where the same still remains of record.

64 The said final receipt and the record thereof and the said patent and the record thereof constitute a cloud upon the title of your orator to the said parcel of land which prevent the sale thereof by your orator and greatly impair the value thereof.

And your orator well hoped that no disputes would have arisen touching the said parcel of land or the title thereto, but that the said defendant would have complied with the reasonable request of your orator, as in conscience and equity she ought to have done.

But now so it is, may it please your honors, that the said Mary Bardon, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays may be inserted herein, with apt words to charge them as parties defendant hereto, and, contriving how to injure and wrong your orator, the said defendant, Mary Bardon, sometimes alleges and

pretends that prior to Sept. 12, A. D. 1855, the said parcel of land had been conveyed by the United States and on said date was subject to sale by pre-emption under the pre-emption laws of the United States, and that — said last-mentioned date one James Robinson, Jr., filed in the proper land office his declaration of settlement on said *on* parcel of land under said pre-emption laws of the United States, and afterwards, to wit, on July 30, 1857, made his proofs before the proper officers of the land office, and did thereupon and on that day pay for the same, as provided by said pre-emption laws; and that afterwards, to wit, on Aug. 5, 1865, the United States did, upon grounds unknown to the defendant, refund the money paid by said Robinson for said parcel of land as aforesaid, and duly set aside and canceled said pre-emption entry and sale, and that by virtue of the premises your orator acquired no right, title, or interest in or to said parcel of land by filing the map or diagram of its gen-
65 eral route on March 6, A. D. 1865, as hereinafter mentioned.

But your orator avers the contrary to be the truth and shows unto your honors that from and after said twenty-first day of September, A. D. 1855, upon which date the said James Robinson, Jr., filed his declaratory statement as aforesaid, he, the said James Robinson, Jr., resided on said parcel of land until the month of December, A. D. 1857, in which month (the day being unknown to your orator) he, the said James Robinson, Jr., died without having at any time made the proofs of settlement required by said pre-emption laws, and that such proofs of settlement were never at any subsequent time made by the administrator or heirs of said James Robinson, Jr., or by any one, and said parcel of land was, on March 6, 1865, vacant and unoccupied; and that on Aug. 5, 1865, said entry of James Robinson, Jr., was cancelled by the United States as aforesaid, for the reason that said proofs of settlement had not been made as aforesaid and not otherwise, and that at the date of the filing as aforesaid by your orator of the map of general route hereinafter mentioned, to wit, on March 6, A. D. 1865, the heirs of the said James Robinson, Jr., did not claim, nor have they since claimed, and they did not have, any right, title, or interest in or to said parcel of land under or by virtue of said entry by the said James Robinson, Jr., or otherwise.

And the said defendant, Mary Bardon, sometimes further alleges and pretends that on June 3, 1856, by an act on that day approved, entitled "An act granting public lands to the State of Wis-
66 consin to aid in the construction of railroads in said State," Congress granted to said State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison to Columbus by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads respectively, with a condition that if, when the lines or routes of said roads should be definitely fixed the United States should have sold any sections or parts of sections or the right of pre-emption had attached to the same, the State of Wisconsin

should select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections or parts of sections as should be equal to the lands sold or pre-empted as aforesaid, which lands so selected should be held by said State for the uses and purposes above specified; that said grant was duly accepted by the said State of Wisconsin; that afterwards, to wit, on March 5, A. D. 1857, by an act on that day approved, said State of Wisconsin duly granted said lands to the St. Croix & Lake Superior Railroad Company, a corporation duly organized and existing under the laws of said State of Wisconsin; that on Nov. 2, 1857, said St. Croix & Lake Superior Railroad Company duly filed with the Secretary of the Interior a map or diagram of its line of railroad as definitely fixed, and that said parcel of land was within six miles of said line so definitely fixed by said map or diagram.

67 But your orator avers the truth to be and shows unto your honors that long prior to the date of the filing of said map of definite location by said St. Croix & Lake Superior Railroad Company, to wit, on Sept. 21, 1855, said James Robinson, Jr., had filed his declaratory statement of settlement on said parcel of land in the office of the said Bayfield land district, and on said last-mentioned date had duly made and perfected in said land office a pre-emption entry of said parcel of land as aforesaid under the pre-emption laws of the United States, and on said Nov. 2, 1857, said pre-emption entry on said parcel of land existed of record and was valid and of full effect, and was not cancelled as aforesaid until Aug. 5, 1865; and that on said Nov. 2, 1857, the said James Robinson, Jr., was residing upon and occupying said parcel of land, and claimed the same under and by virtue of his pre-emption entry as aforesaid.

And the said defendant sometimes further alleges and pretends that on May 5, 1864, by an act on that day approved, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," Congress granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad to be selected by said State, to Bayfield, Wisconsin, and to Superior, Wisconsin, every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that

68 may have been granted to said State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, and upon the same terms and conditions as were contained in said last-mentioned act; that said grant was duly accepted by said State of Wisconsin; that afterwards, to wit, on April 5, 1866, and April 9, 1866, a corporation was created by said State of Wisconsin by the name of the Portage, Winnebago & Superior Railroad Company, and was by said last-mentioned acts granted the lands granted to said State of Wisconsin by last-mentioned act of Congress as aforesaid; and was, among other things, authorized to construct a line

of railroad from Bayfield, Wisconsin, to Superior, Wisconsin; that on Sept. 7, 1869, the said Portage, Winnebago & Superior Railroad Company filed a map or diagram of its line of railroad between Bayfield and Superior, as definitely fixed, in the office of the Secretary of the Interior and the Commissioner of the General Land Office, and that the said parcel of land was within ten miles of said line of railroad as definitely fixed by said map or diagram.

But your orator avers the truth to be and shows unto your honors that the line of definite location of said line of railroad, as fixed by said map, commenced at Bayfield, Wisconsin, and thence ran in a southwesterly direction to the central point of the east line of section 3, township 47, range 10, in said Douglas county; that it ran thence due west for a distance of fourteen miles, to the central point of the west line of section 4, township 47, range 12; that it ran thence in a northwesterly direction a distance of about ten miles, to the centre of section 29, township 49, range 13, in said county; that the
69 limits of the land grant pertaining to said line were not marked out or delineated on said map; that thereupon a copy of said map was transmitted by the Commissioner of the General Land Office to the register and receiver of the Bayfield land office on Dec. 10, 1869; that on said copy were marked and delineated the lateral limits of the land grant of said line running parallel to said line, but the limits of said land grant at the western end of said line and at right angles thereto were not marked on said copy; that a letter of instructions was transmitted by said Commissioner of the General Land Office to said register and receiver along with said copy, being in the words following, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Dec.* 10, 1869.

"Register and receiver, Bayfield, Wisconsin,

"GENTLEMEN: I enclose you herewith a diagram of the Portage, Winnebago & Superior railroad, under the act of May 5, 1864, 3d section, and joint resolution 21st June, 1866, with the ten and twenty mile limits of the land grant designated thereon.

"You are hereby directed to withdraw from sale, location, pre-emption or homestead entry, all the odd-numbered sections of land falling within those limits, and to regard as increased in price to $2.50 per acre all the even-numbered sections within the ten-mile granted limits.

"The even sections between the ten and twenty mile limits are not affected by this withdrawal.

"The lands herein increased to $2.50 per acre you will dispose of only under the pre-emption and homestead laws, and at that ratability, except in cases of *bona fide* pre-emption settlement *prior* to receipt of this letter of withdrawal. In such cases the settler will, under the provisions of the act of March 27, 1854, be permitted to prove up on and pay for his land, whether upon odd or even sections, at $1.25 per acre.

70 "This order will take effect from the date of its receipt by you, and you are requested to acknowledge the same by date.

"Very respectfully, JOS. S. WILSON,

"*Commissioner.*"

Your orator further alleges that said copy of said map and said letter of instructions were received by said register and receiver in due course of mail; that the only withdrawal of lands pertaining to said line that has ever at any time been made was and is the withdrawal made by said letter of instructions. On July 12, 1883, the Commissioner of the General Land Office of the United States duly adjusted, fixed, and determined the terminal limits of said withdrawal and of said grant at the west end of said line and at right angles thereto; that said terminal limits so fixed and determined as aforesaid commenced at the centre of said section twenty-nine, township forty-nine, range thirteen (the western terminal point of said line of the Portage, Winnebago & Superior Railroad Company as definitely fixed by said map aforesaid), and ran thence in a due southwest course through section thirty-one, township forty-nine, range thirteen; section thirty-six, township forty-nine, range fourteen; sections two, three, eight, nine, ten, sixteen, and seventeen, township forty-eight, range fourteen; section twenty-four, township forty-eight, range fifteen, to the northwest corner of the southeast quarter of the southwest quarter of section twenty-three, township forty-eight, range fifteen, at which point it joined the southern ten-mile limit of said grant, and that said parcel of land is without the limits of said grant and of said withdrawal as fixed and determined as aforesaid, as will more fully appear by a plat of the line of

71 definite location of said line, which is hereto annexed, whereon is marked the southern ten-mile limit of said grant and the terminal limits thereof at right angles to said line, as fixed and determined by said Commissioner as aforesaid.

And the said defendant sometimes further alleges and pretends that the name of the Portage, Winnebago & Superior Railroad Company was, on Feb. 4, 1871, duly changed by the Legislature of Wisconsin to the Wisconsin Central Railroad Company; that on Jan. 25, A. D. 1881, said defendant entered upon and made settlement upon said parcel of land, being qualified as a pre-emptor, and having resided and made improvements on said parcel of land from said last-mentioned date until June 22, 1882, and after having published in a newspaper printed and published in said county of Douglas a notice to all adverse claimants to said parcel of land to appear before the register and receiver of the United States land office at Bayfield, Wisconsin, and contest her right to enter said parcel of land by pre-emption, did on said last-mentioned date proceed to introduce proof before said officers in support of her right to enter the same by pre-emption; that the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, as the successors of the St. Croix & Lake Superior Railroad Company, appeared at the time and place aforesaid before said officers and contested the right of defendant to enter said parcel of land by pre-emption; that after a

hearing said officers decided in favor of defendant's said right and allowed her to enter and pay for said parcel of land by pre-
72 emption; that after said hearing and decision your orator appealed from the decision of said register and receiver to the Commissioner of the General Land Office, who affirmed the decision of said register and receiver; that thereupon your orator appealed from the Commissioner of the General Land Office to the Secretary of the Interior, and that said Secretary of the Interior did, on Aug. 10, 1886, confirm the decision of the said Commissioner and the said register and receiver.

But your orator avers the truth to be and shows unto your honors that your orator never at any time prior to the date of said hearing before said register and receiver had any notice whatever of the same, but was wholly ignorant thereof, and had no knowledge whatever of the intention of said defendant to make her said application to the said register and receiver until long after the same had been made by her and her entry had been allowed by said register and receiver, by reason of which facts your orator failed to be present thereat; that upon the said appeal by your orator from the decision of said register and receiver to said Commissioner of the General Land Office as aforesaid he, the said Commissioner of the General Land Office, wrongfully refused to consider the merits of the claim of your orator and affirmed said decision of said register and receiver solely upon the ground that your orator had not at the time and place of the application of said defendant to the said register and receiver to make her final proof appeared in opposition thereto, and that upon the said appeal by your orator from the said Commissioner to the said Secretary of the Interior the said Secretary in turn wrongfully refused to consider the merits of
73 your orator's claim and affirmed the decision of said Commissioner as aforesaid solely upon the ground that your orator had failed to appear at the hearing before said register and receiver as aforesaid so that the merits of the claim of your orator to said parcel of land under its said land grant have never been considered, either by the said register and receiver or by said Commissioner of the General Land Office or by said Secretary of the Interior.

And said defendant further alleges and pretends that on April 21, 1876, by an act on that day approved, entitled "An act to confirm pre-emption or homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the land department," Congress, among other things, enacted that pre-emption and homestead entries made by permission of the land department within the limits of any railroad land grant at a time subsequent to the expiration of such grant should be deemed valid, and a compliance with the laws and the making of the proof required should entitle the holder of the claim to a patent, and that land grant of your orator expired on July 4, 1880.

But your orator avers the contrary to be the truth, and that its said land grant has not yet expired.

To the end, therefore, that the defendant may answer the prem-

ises (answer under oath being hereby expressly waived) and show cause, if any she have, why the relief herein prayed be not granted—that is to say, that the right, title, and interest acquired by the said Mary Bardon in and to the said parcel of land by virtue of said patent be adjudged and decreed to have been acquired and
74 to be held by said defendant in trust for the use of and benefit of your orator—and that said defendant be decreed to convey said right, title, and interest in said parcel of land to your orator by a good and sufficient deed, or in lieu thereof that a commissioner be appointed to convey the same for the said defendant, and that your orator have such other and further relief as may be equitable and just in the premises—

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, issuing under the seal of your honorable court, directed to the said defendant, Mary Bardon, and commanding her, under pains and penalties to be specified in said writ, to be and appear before your honors in your honorable court aforesaid, at a day specified in said writ, then and there to answer the premises and do and abide the order and decree of your honors touching the same; and your orator will ever pray, etc.

C. L. CATLIN,
Solicitor for Complainant.

JAMES McNAUGHT,
JNO. C. BULLITT,
Of Counsel.

75 United States Circuit Court, Western District of Wisconsin.
In Equity.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
MARY BARDON, Defendant.

I.

The answer of Mary Bardon, defendant, to the bill of complaint of The Northern Pacific Railroad Company, complainant.

This defendant, now and at all times hereafter saving and reserving unto herself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for her to make answer unto, this defendant, *for* answering, saith that she admits that the allegations and averments of the complainant's said bill contained on the first four pages thereof and upon
76 the fifth page thereof down to the words "heretofore mentioned," in the thirty-fifth and thirty-sixth lines thereof, are true as in said bill set forth and averred, but denies that, at the times of the filing of said first map or diagram, or at the time of filing said second map or diagram, or on March 6, A. D. 1865, or on

Aug. 13, A. D. 1870, or at all or any of the times between said last-mentioned dates and up to Jan. 25, 1881, said land was vacant or unoccupied, and avers that said land was entered and occupied at and between all said dates, as hereinafter alleged.

II.

The defendant, further answering, admits that the tract in said complaint described is wholly situated within the distance of twenty miles from the line of said general route and wholly within the same distance of the line of plaintiff's definitely located and constructed railroad as alleged in the complaint, but the defendant denies that the said parcel of land at the time of the filing of said map of the general route in the office of the Secretary of the Interior, or at the time of the issuance of the letter of instruction from the Commissioner of the General Land Office to the register and receiver of the Bayfield land district, or during any time intermediate, formed a parcel of the public lands of the United States to which the United States then had full or any title, and avers that the same had then been sold, granted, and appropriated and was then and during all of said time subject to pre-emption and other claims and rights and had not been any portion of the public lands of the United
77 States at any of the times above designated free from pre-emption or other claims or rights, and avers that the same was not included in the said grant to the plaintiff, and that no right thereto ever attached in favor of the plaintiff, as alleged in the plaintiff's complaint, or otherwise.

The defendant, further answering, avers that the said tract and parcel of land in said complaint described and all the public lands of the United States in the State of Wisconsin lying within twenty miles of the line of the definite location and constructed road of the plaintiff was surveyed long prior to said grant to the plaintiff, and was subject to sale by pre-emption prior to the twelfth day of September, A. D. 1855, and that on that day one James Robinson, Jr., did make a pre-emption settlement thereon as provided by law, and thereafterwards and on the thirtieth day of July, 1857, did make his final proof before the proper officers of the land office of his settlement, improvements, and qualifications to enter said land under the pre-emption laws, and did thereupon and on that day purchase the same by pre-emption and pay for the same to the United States as provided by law, and retained and held the right to the title so vested in him from that date until the fifth day of August, 1865, when, upon grounds to this defendant unknown, the department refunded the purchase-money so paid for said land to said James Robinson, Jr., and cancelled and set aside said pre-emption entry and sale, and again, on the seventeenth day of December, 1871, sold the same to one Owen Sheridan for cash, as provided by law, and thereafterwards, on the second day of May, 1881, for some cause to the defendant unknown, cancelled said entry and sale.

78 The defendant, further answering, alleges that heretofore, on the third day of June, 1856, the Congress of the United

States, by an act passed on that day, entitled "An act granting public lands to aid in the construction of railroads in that State," did grant to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively, with a condition that if when the lines or routes of said roads are definitely fixed the United States have sold any sections or parts thereof or the right of pre-emption had attached to the same that the State should select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the right of pre-emption had attached, which lands so selected should be held by the State for the uses and purposes above specified, which grant was thereafterwards duly accepted by the State of Wisconsin and duly granted to the St. Croix & Lake Superior Railroad Company, so far as the grant pertained to a line of road from Lake St. Croix to Lake Superior, by an act of the Legislature of Wisconsin passed and approved on the twenty-fifth day of February,
79 1854, entitled "An act to incorporate the St. Croix & Lake Superior Railroad Company," and by an amendment to said act passed and approved on the fifth day of March, 1857, by the Legislature of Wisconsin, entitled "An act to amend an act entitled 'An act to incorporate the St. Croix & Lake Superior Railroad Company,'" approved Feb. 24, 1854; and the defendant avers that said tract of land in plaintiff's complaint described is within six miles of the line of road definitely located by the St. Croix & Lake Superior Railroad Company, which company definitely located its line of road and filed its map of the same with the Secretary of the Interior on the fifth day of November, A. D. 1857, and that said corporation and its successors in interest have since fully constructed and equipped said road to the mouth of the Nemagi river, but not to the west end of Lake Superior, and the same has been duly accepted by the Department of the Interior and the United States.

And the defendant, further answering, avers that the Commissioner of the General Land Office and the Secretary of the Department of the Interior did, upon the filing of said map or diagram of the line of railroad as definitely fixed on Nov. 2, 1857, by the St. Croix & Lake Superior Railroad Company, fix the western limit of said grant as made at the easterly bank of the St. Louis river as the same runs south from the west end of Lake Superior, and then and there withdrew all odd-numbered sections from sale east of said bank of said river within the limits of the north and south lines of said grant, and advanced the price of all the even-numbered sec-
80 tions within said limits, including the even-numbered sections contiguous to and near the said tract since patented to this

defendant to two dollars and fifty cents per acre; and the defendant denies that the westerly limit of said grants to the State of Wisconsin is or ever has been as averred and alleged in complainant's complaint, but has always been and is at the west end of Lake Superior and along the east bank of said river as it runs south from said west end of said lake, and avers that said tract of land is and always has been within the limits of said grants to the State of Wisconsin and the withdrawals of the Interior Department and of the United States on account thereof, and avers that said terminal limit of said grants found and fixed by the Commissioner of the General Office on July 12, 1883, were found and fixed solely with reference to the westerly end of the constructed and completed railroad under said grants at the mouth of the Nemagi river, instead of the actual westerly limits of said grant, which was six miles farther west at the west end of Lake Superior, and aver that said tract and parcel of land has always been within the limit of said grants and so considered and treated by the Interior Department and the United States from Nov. 2, 1857, to the time when said tract was patented to the defendant, and that said terminal limit was readjusted July 12, 1883, with reference to the completed road and not with reference to the grant.

The defendant, further answering, avers that on the fifth day of May, 1864, the Congress of the United States passed an act entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," whereby there was granted by the United States to the State of Wisconsin, for the purpose of
81 aiding in the construction of a railroad from a point on the St. Croix river or lake between townships twenty-five and thirty-one to the west end of Lake Superior, and from some point on the line of said railroad to be selected by said State to Bayfield, every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained in said act, except such lands within said limits as should be sold, reserved, or to which homestead or pre-emption rights should have attached when said line should be definitely fixed and located.

The defendant further avers that the State of Wisconsin did duly accept said grant, and thereafterwards, on the sixth day of April, 1866, did pass an act entitled "An act to incorporate the Winnebago & Lake Superior Railroad Company and to execute the trust created by section 3 of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,'" approved May 5, 1864, and thereafterwards, on the 9th day of April, 1866, did pass an act entitled "An act to incorporate the Portage & Superior Railroad Company and to execute the trust created by an act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,'" approved May 5, 1864, and avers that both of said corporations were duly organized and under and by virtue of certain provisions in the acts

aforesaid were duly consolidated into a corporation by the
82 name of the Portage, Winnebago & Superior Railroad Company, and avers that all the rights to land granted in and by said acts of Congress to the State of Wisconsin pertaining to the lines designated and described in the aforesaid acts of the Legislature of Wisconsin were granted to said corporation and its successors, and avers that under and by virtue of said acts and the powers vested in said corporations by said acts and the acts supplemental thereto and amendatory thereof said lines of road have been constructed, and avers that the Portage, Wisconsin & Superior Railroad Company definitely fixed its route as required by the said acts of Congress, and filed a map thereof with the Secretary of the Department of the Interior and the Commissioner of the General Land Office on the seventh day of September, 1869, and avers that the tract and parcel of land described in the plaintiff's complaint was within ten miles of said road as definitely fixed and described on said map; and the defendant avers that the Legislature of the State of Wisconsin on the fourth day of February, 1871, passed an act entitled "An act to change the name of the Portage, Winnebago & Superior Railroad Company," whereby the name of said company was changed to the Wisconsin Central Railroad Company and vested, among other things, with all the rights, powers, privileges, trusts, property, and franchises which had been conferred or acquired by the railroad companies consolidated by filing articles with the secretary of state on May 24, 1864.

III.

The defendant, further answering, avers that on Jan. 25, A.
83 A. 1881, said tract of land described in the plaintiff's complaint then being a portion of the public lands of the United States not included in any grant nor reserved for any purpose and being subject to entry and sale by pre-emption, the defendant entered upon and made a settlement upon the same, and being qualified as a pre-emptor and having resided and made improvements thereon from that date until June 22, 1882, after having given due notice to all adverse claimants to said land to appear before the register and receiver of the United States land office at Bayfield, Wisconsin, and contest her right to enter said tract by pre-emption, did on that day proceed to introduce proof before said officers in support of her right to enter the same by pre-emption; and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, as successor to the St. Croix & Lake Superior Railroad Company, and the Portage, Winnebago & Superior Railroad Company and Wisconsin Central Railroad Company did appear at the time and place aforesaid before said officers and contest the right of the defendant to enter said land by pre-emption, and after a full and fair hearing of all the evidence and arguments of counsel the said officers did decide and determine that the defendant had the legal right to enter and pay for said land by pre-emption, and thereupon she lawfully and rightfully purchased and paid for the same from the United States.

And the defendant avers that after said hearing and determination the plaintiff in this action appeared in said case and took an appeal from the decision of the register and receiver aforesaid to the Commissioner of the General Land Office, who, after a
84 full and fair hearing, both of the plaintiffs and the defendant, conducted in all respects according to the rules and regulations of the General Land Office, did, on the twenty-eighth day of November, 1883, after a full hearing of all parties and a full consideration of said controversy upon the merits, confirm the decision of the register and receiver, and duly approved of the cash entry thereof made by this defendant, subject to appeal by the Northern Pacific Railroad Company to the Secretary of the Interior, a copy of said decision being hereto attached and marked "Exhibit A" and made part of this answer; and thereupon the said Northern Pacific Railroad Company did appeal to the Secretary of the Interior from said decision of the Commissioner of the General Land Office in accordance with the rules and practice of said department, and after a full and fair hearing and argument made on behalf of the plaintiff and the defendant the acting Secretary of the Interior, Hon H. L. Muldrow, did, on the tenth day of August, 1886, confirm the said decision of the Commissioner of the General Land Office and of the register and receiver, holding said cash entry of the defendant for approval; and thereafterwards, on the nineteenth day of January, A. D. 1887, the United States caused to be executed by the proper officers and to be delivered to this defendant a patent as provided by law for said tract of land, whereby defendant became and now is the owner thereof in fee simple and vested with an indefeasible estate of inheritance thereto.

IV.

The defendant, further answering, avers that on the twenty-
85 first day of April, 1876, the Congress of the United States passed an act entitled "An act to confirm pre-emption or homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the land department," whereby, among other things, it was provided that pre-emption and homestead entries made by permission of the land department within the limits of any land grant at a time subsequent to the expiration of such grant shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor, and avers that the time of the expiration of said grant to the plaintiff expired on the fourth day of July, A. D. 1880.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith she is by the said bill charged; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confirmed, traversed, and avoided or denied is not true to the knowledge or belief of this de-

fendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

MARY BARDON, *Defendant.*

JOHN B. & W. H. SANBORN,
E. L. JOHNSON,
Solicitors of Defendant.
JOHN B. SANBORN, *Of Counsel.*

86 STATE OF WISCONSIN, } ss:
County of Douglas, }

Mary Bardon came before me personally, and being duly sworn doth say that she is the defendant in the above-entitled action; that the foregoing answer is true of her own knowledge, except as to those matters therein stated on her information and belief, and as to those matters that she believes it to be true.

MARY BARDON.

Subscribed and sworn to before me this third day of February, A. D. 1887.

JOHN A. BARDON,
[NOTARIAL SEAL.] *Notary Public, Douglas County, Wis.*

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov.* 28, 1883.

Register and receiver, Bayfield, Wis.

GENTLEMEN: Mary Bardon filed D. S. No. 654 for N. E. ¼ sec. 33, T. 49, R. 14 W., Feb. 14, '81, alleging settlement Jan. 25, 1881, and made cash entry 3698 thereon June 22, 1882.

Said tract is within the six miles granted limits of the act of
87 June 3, 1856, for the benefit of the St. Croix & Lake Superior, now Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The withdrawal was ordered by telegram May 29, 1856, and public notice, dated June 12, 1856, continued the withdrawal.

The right of the said road to the grant attached Nov. 2, 1857.

The records of this office show that James Robinson, Jr., filed D. S. 107 for said tract, Sept. 21, 1855, alleging settlement Sept. 12, 1855, and proof was made thereon by his heirs under cash entry 429, July 30, 1857.

Said cash entry was cancelled Aug. 5, 1865, for failure to furnish proof of residence upon said tract between April 25, 1856, date of making pre-emption proof, and July 30, 1859, date of administrator's oath.

Owen Sheridan made H. D. entry 47 for the same tract, Dec. 7,

1871, and it was cancelled June 30, 1880. Louis J. Lemoit filed D. S. 669 for the same tract May 2, 1881, alleging settlement April 3, 1881.

As the cash entry by the heirs of James Robinson, Jr., deceased, was existing on said tract at the date of the attachment of the rights of said road, viz., Nov. 2, 1857, and was not cancelled until Aug. 5, 1865, I think the tract was excluded from said grant.

The above-mentioned tract is also within the twenty-miles limit of the act of July 2, 1864, for the benefit of the Northern Pacific Railroad Company, but being within the granted limits of the act of 1856 for the benefit of the St. Croix Lake & Superior Railroad Company, I think the tract is therefore excluded from said grant.

88 The cash entry by Miss Bardon is therefore this day held for approval subject to appeal by the railroad companies.

Notify all parties in interest hereof, and at the proper time report any action taken.

The resident attorney for the Northern Pacific Railroad Company will be notified by this office.

Very respectfully,

N. C. McFARLAND,
Commissioner.

89 United States Circuit Court, Western District of Wisconsin.
In Equity.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
MARY BARDON, Defendant.

Replication.

The replication of the Northern Pacific Railroad Company to the answer of Mary Bardon, defendant.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any otherm atter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by *his* said bill *he* hath already prayed.

C. L. CATLIN,
Solicitor for Complainant.

90 United States Circuit Court, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
MARY BARDON, Defendant.

Stipulation.

It is hereby stipulated between the parties in the above-entitled action and their counsel, for the purpose of avoiding the expense of taking testimony, that, in addition to the facts set forth in the bill of complaint as amended and admitted by or in the answer, that the following facts shall be deemed and taken to be true, and, with said admissions, shall constitute the evidence upon which this cause shall be tried and determined.

I.

That on and prior to Sept. 12, A. D. 1855, the tract of land described in the bill of complaint and answer, to wit, the northeast quarter of section 33, township 49, range 14 west, State of Wisconsin, had been surveyed by the United States and was a part of the public domain, subject to sale by pre-emption and otherwise as then provided by law.

91 II.

That on said Sept. 12, 1855, James S. Robinson, Jr., settled upon said land, and that at said time said Robinson was a duly qualified pre-emptor.

III.

That on the twenty-first day of September, A. D. 1855, said Robinson duly filed his declaration of settlement upon said tract of land under the pre-emption laws of the United States with the register and receiver of the proper land office of the United States.

IV.

That said Robinson died without making final proof on said pre-emption claim or paying the Government therefor.

V.

That after the death of said Robinson his heirs, on the thirtieth day of July, A. D. 1857, made payment for said land and received the receiver's receipt therefor and a certificate from the register, certified copies of which are hereunto annexed and marked Exhibit "A."

That on Aug. 5, 1865, said pre-emption entry was duly cancelled by the Commissioner of the General Land Office for failure to furnish proof of continuous residence prior to July 30, 1857.

VI.

92 That said Robinson did not in his lifetime pay the Government the amount of money nor any amount required to be paid by him under the pre-emption laws of the United

States or any laws to acquire title to said land, except such fees as are paid local land officers at the time of filing a pre-emption application; that whatever money was paid for and on account of said land prior to 1865 was paid by the heirs of said Robinson, except the fees as aforesaid, and whatever money was so paid was refunded to said heirs by the Government upon the cancellation of said pre-emption claim, as heretofore stated, and was accepted by said heirs.

VII.

That no person was actually residing upon said land July 2, 1864, or at any time subsequent thereto and prior to Dec. 2, 1871, and no person claimed a residence thereon or had any interest therein subsequent to Aug. 5, 1865, and prior to said Dec. 2, 1871, except such interest, if any, as the St. Croix & Lake Superior Railroad Company, the Portage, Winnebago & Superior Railroad Company, and this complainant acquired by reason of the acts of Congress, of the Legislature of Wisconsin, the acts of the officers of the Interior Department and Land Office, and of said railroad companies or either of them appearing in this stipulation and the pleadings in this cause.

VIII.

That the allegations of the answer as to the act of Congress of June 3, 1856, granting lands to the State of Wisconsin and the various acts of the Legislature of the State of Wisconsin thereunder are true.

93 IX.

That said tract of land is within six miles of the line of road definitely located by the St. Croix & Lake Superior Railroad Company, now the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, which company definitely located its line of road and filed its map of the same with the Secretary of the Interior on the fifth day of November, A. D. 1857, and that said corporation and its successors in interest have since fully constructed and equipped said road to the mouth of the Nemagi river, and the same has been duly accepted by the Department of the Interior and the United States.

X.

That the Commissioner of the General Land Office and the Secretary of the Interior did, May 29, 1856, fix the western limit of said grant as made at the easterly bank of the St. Louis river as the same runs south from the west end of Lake Superior, and then and there withdrew all odd-numbered sections of public land from sale east of said bank of said river within the limits of the north and south lines of said grant, and advanced the price of all the even-numbered sections within said limits, including the even-numbered sections contiguous to and near the said tract since patented to this defendant, to $2.50 per acre.

XI.

That said land is within the limits of said grant to the State of Wisconsin and the withdrawal by the Interior Department and by the United States on account thereof.

94

XII.

That Nov. 8, 1862, the Commissioner of the General Land Office forwarded to the register and receiver of the United States land office at Bayfield, Wisconsin, a diagram showing line of definite location of the St. Croix & Lake Superior railroad, with the six and fifteen mile limits of the land grant designated thereon, and that Exhibit "B," hereunto annexed, is a true copy of said diagram.

XIII.

That Exhibit "C," hereunto annexed, is a true and correct copy of the letter of the Commissioner accompanying said diagram.

XIV.

That said diagram and letter were received by said register and receiver at Bayfield, Wisconsin, Nov. 25, 1862.

XV.

That April 22, 1865, the board of directors of said St. Croix & Lake Superior Railroad Company duly accepted the additional land grant made by act of Congress of May 5, 1864, and conferred upon said company by the State of Wisconsin by an act approved March 20, 1865, and by a resolution of said board adopted as the line of definite location of said railroad under said grant the line of said railroad as then located by maps on file in the Land Office at Washington, D. C.

95

XVI.

That May 5, 1865, D. A. Baldwin, on behalf of said company, forwarded a copy of said acceptance of said grant and of said resolution to the Commissioner of the General Land Office and requested that the said lands granted by the said act of Congress of May 5, 1864, be withdrawn from market; that Exhibit "D," hereunto annexed, is a correct copy of said letter of said Baldwin and of said acceptance of said grant and resolution of said board of directors; that said letter, acceptance, and resolution were received by the said Commissioner at Washington, D. C., May 6, 1865, and filed in the office of the Commissioner of the General Land Office.

XVII.

That May 10, 1865, said Commissioner of the General Land Office acknowledged the receipt of said letter, acceptance, and resolution and refused to withdraw said lands for reasons set forth in said letter of said Commissioner; that a true and correct copy of said letter of said Commissioner is hereunto annexed and marked Exhibit "E."

XVIII.

That Feb. 28, 1866, the Commissioner of the General Land Office forwarded to the local land officers at Bayfield, Wisconsin, a diagram showing the definitely located line of the said St. Croix & Lake Superior railroad, with the ten and twenty mile limits of the land grant designated thereon; that Exhibit "B," hereunto an-
96 nexed, is a true and correct copy of said diagram; that said diagram was received by said local land officers at Bayfield, Wisconsin, March 17, 1866.

XIX.

That the map of definite location of the Portage, Winnebago & Superior railroad was filed with the Secretary of the Interior in the office of the Commissioner of the General Land Office Sept. 7, 1869.

XX.

That December 10, 1869, the Commissioner of the General Land Office sent to the register and receiver of the United States land office at Bayfield, Wisconsin (within which land district said land was then situated), a diagram of the line of the Portage, Winnebago & Superior railroad, with the ten and twenty mile limits of the land grant to said railroad designated thereon, and ordered the withdrawal from sale, location, pre-emption, or homestead entry of all odd-numbered sections of land falling within said limits; a copy of which order is hereunto annexed and marked Exhibit "F."

XXI.

That Exhibit "G," hereunto annexed, is a copy of that portion of said diagram accompanying said order of withdrawal west of range 10 west, Wisconsin.

XXII.

That the name of the Portage, Winnebago & Superior Railroad Company was, Feb. 4, 1871, duly changed by the Legislature of the State of Wisconsin to Wisconsin Central Railroad Company.

97 XXIII.

That the said order of withdrawal, dated Dec. 10, 1869, was the only order of withdrawal ever made for the benefit of the Portage, Winnebago & Superior Railroad Company, its predecessors or successors.

XXIV.

That March 27, 1883, W. K. Mendenhall, Esq., wrote to the Commissioner of the General Land Office, requesting that a terminal limit to the withdrawal for the Wisconsin Central Railroad Company, successor to the Portage, Winnebago & Superior Railroad Company, should be established, a copy of said letter being hereunto annexed and marked Exhibit "H;" and July 3, 1883, said

Mendenhall again wrote to the Commissioner of the General Land office, renewing said request and enclosing a letter from Edwin H. Abbott, vice-president of the Wisconsin Central Railroad Company, concurring therein, copies of said letters being hereunto annexed and marked Exhibit "I."

XXV.

That July 12, 1883, the Commissioner of the General Land Office transmitted to the register and receiver at Bayfield, Wisconsin, an order fixing a terminal limit of said withdrawal for said Wisconsin Central Railroad Company, successor to said Portage, Winnebago & Superior Railroad Company, and transmitted therewith a diagram showing said terminal limit as fixed by said order, certified copies of said order and diagram being hereunto annexed and marked respectively Exhibits "J" and "K."

98

XXVI.

That the diagram hereunto annexed and marked Exhibit "L" is a copy of that portion of the diagram west of range 11 west and in the State of Wisconsin showing the limit for withdrawal for the Northern Pacific Railroad Company ordered by letter of Sept. 15, 1870, to the register and receiver at Bayfield, Wisconsin (the letter set forth in the complaint and specifically admitted in the answer herein), and is a copy of the diagram, or so much thereof as lies within the State of Wisconsin and west of range 11 west, accompanying said letter of Sept. 15, 1870.

XXVII.

That Exhibit "M," hereunto annexed, is a copy of that portion of a diagram showing the limits (20, 30, and 40 miles) of a withdrawal ordered Jan. 5, 1883, in Wisconsin, on the filing of the map of the definite route by the Northern Pacific Railroad Company, and transmitted by the Commissioner of the General Land Office to the register and receiver at Bayfield, Wisconsin, with said order of withdrawal, between the city of Superior and the western boundary line of the State of Wisconsin.

XXVIII.

That Dec. 2, 1871, Gwen Sheridan made homestead application No. 47 to enter said tract of land, and that copies of the homestead entry papers aforesaid of said Sheridan are hereunto annexed and marked Exhibit "N;" that said entry was the first entry and the first settlement upon said land subsequent to the abandon-
99 ment of said tract by the heirs of said Robinson; that said entry was duly cancelled June 30, 1880.

XXIX.

That Jan. 25, 1881, the defendant herein, Mary Bardon, settled upon said tract of land, and Feb. 14, 1881, filed declaratory statement No. 654 therefor, a copy of said declaratory statement being hereunto annexed and marked Exhibit "O."

XXX.

That the papers hereunto annexed and marked Exhibit "P" are full and complete copies of the pre-emption cash entry papers No. 3698, together with the endorsements thereon, of Mary Bardon, the defendant herein, for said tract of land.

XXXI.

That no personal service of notice of her intention to make final proof upon her pre-emption entry for said tract of land was ever made by said Mary Bardon or by any one in her behalf upon said Northern Pacific Railroad Company, and said company had no actual notice of said proceeding in the local land office until subsequent thereto, but that notice was given in the manner as shown by Exhibit "P."

XXXII.

It is admitted as a fact by the parties to the above-entitled action that the Wisconsin Central Railroad Company and said plaintiff, Northern Pacific Railroad Company, did not appear before the land officers or at the land office in Bayfield at the time that the
100 defendant proved up on her pre-emption claim to the land in controversy and entered and made payment therefor, and that said Wisconsin Central Railroad Company at no time took any appeal from the decision of the said local land officers and made no appearance at any time before any officer or bureau of the Interior Department in relation to said tract of land; and that the only rights of said company, if any, to said tract of land at any time are such, and such only, as have arisen from the acts of Congress, the filing of its map of definite location by said road, and the letters and instructions of the officers of the Interior Department and of the officers of the General Land Office as they appear in the record, letters, maps, and exhibits appearing in this case.

XXXIII.

That subsequent to the hearing and allowance of the application to make entry of said tract by the register and receiver, as set forth in Exhibit "P," said plaintiff duly appealed from said decision to the Commissioner of the General Land Office, and Nov. 28, 1883, said Commissioner of the General Land Office, after hearing the plaintiff, sustained said decision of the register and receiver, a copy of said decision of the Commissioner of the General Land Office being hereunto annexed and marked Exhibit "R."

XXXIV.

That Dec. 22, 1883, said plaintiff duly appealed from said decision by the Commissioner of the General Land Office to the Secretary of the Interior, and that Exhibit "S" hereunto annexed is a copy of said appeal.

101

XXXV.

That Aug. 10, 1886, the Secretary of the Interior, after hearing the plaintiff, affirmed the decision of the Commissioner of the General Land Office, and that Exhibit "T," hereunto annexed, is a copy of said decision by the Secretary of the Interior.

XXXVI.

That on the nineteenth day of January, 1887, the United States issued to said defendant a patent for said land in the form provided by law, a copy of said patent being hereunto annexed and marked Exhibit "U."

XXXVII.

That Exhibit "V," hereunto annexed, is a copy of so much of the tract books of the General Land Office as relate to the land in controversy.

XXXVIII.

That Exhibit "W," hereunto annexed, is an abstract copy of the "Abstract of declaratory statements filed in the land office at Bayfield, Wisconsin, during the month of May, 1881, on lands which have been offered at public sale under the President's proclamation."

XXXIX.

That Exhibit "X," hereunto annexed, is an abstract copy of the "Abstract of pre-emption declarations filed in the Fond du Lac land office on unoffered land during the month of November, 1855."

102

XL.

That the diagram hereunto annexed and marked Exhibit "B" correctly represents the withdrawals on lines of general and definite location of said Northern Pacific railroad in the State of Wisconsin west of range 2 west, and so much of the withdrawal for the Portage, Winnebago & Superior Railroad Company, now the Wisconsin Central Railroad Company, as conflicts with said withdrawals for said Northern Pacific Railroad Company.

XLI.

That said Northern Pacific Railroad Company has fully complied with all the terms, provisions, and conditions of the act of July 2, 1864, and the acts and resolutions amendatory thereof and supplementary thereto, except as appears in the bill and answer; that said land lies within the place limits of the grant to said railroad company and passes to said company by reason of said acts and resolutions and the compliance therewith as aforesaid, unless excepted from said grant by reason of the facts set forth in the pleadings and stipulations herein.

JAMES McNAUGHT,
Counsel for Complainant.
JOHN B. SANBORN,
Counsel for Defendant.

Dated at St. Paul, Minn., May 10, 1888.

103 EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copies of the pre-emption cash entry papers No. 429, together with the endorsements thereon, of the heirs of James Robinson, Jr., deceased, for the N. E. ¼ sec. 33, T. 49 N., R. 14 W., Wisconsin, are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

No. 429. RECEIVER'S OFFICE,
SUPERIOR, WIS., *July* 30, 1857.

Received from the heirs of James Robinson, Jr., of —— county, ——, the sum of two hundred dollars and — cents, being in full for the — northeast quarter of section No. 33, in township No. 49 of range No. 14, containing 160 acres and — hundredths, at $1.25 per acre.

E. B. DEAN, JR., *Receiver.*
$200. (PERRY.)

No. 429. RECEIVER'S OFFICE,
SUPERIOR, WIS., *July* 30, 1857.

Received from the heirs of James Robinson, Jr., of ——
104 county, ——, the sum of two hundred dollars and — cents, being in full for the — northeast quarter of section No. 33, in township No. 49 of range No. 14, containing 160 acres and — hundredths, at $1.25 per acre.

$200. E. B. DEAN, JR., *Receiver.*

No. 429. LAND OFFICE,
SUPERIOR, WIS., *July* 30, 1857.

It is hereby certified that, in pursuance of law, the heirs of James Robinson, Jr., deceased, Douglas county, State of Wisconsin, on this day purchased of the register of this office the lot or northeast quarter of section No. thirty-three, in township No. forty-nine of range No. fourteen, containing one hundred and sixty acres, at the rate of one dollar and twenty-five cents per acre, amounting to two hundred dollars, for which the said heirs of James Robinson, Jr., deceased, have made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said heirs of

James Robinson, Jr., dec'd, shall be entitled to receive a patent for the lot above described.

DANIEL SHAW, *Register.*

(Exhibit "B" omitted.)

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* —, 1888.

I, S. M. Stockslager, Commissioner of the General Land
105 Office, do hereby certify that the annexed, being a copy of a letter addressed to the register and receiver at Bayfield, Wisconsin, under date of November 8, 1862, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. M. STOCKSLAGER,
Commissioner of General Land Office.

GENERAL LAND OFFICE, *Nov.* 8, 1862.

Register and receiver, Bayfield, Wisconsin.

GENTLEMEN: I enclose herewith for your guidance in disposing of the public lands along the lines of the railroads in your district a correct diagram of the main line and branch of the St. Croix & Lake Superior roads.

The State of Wisconsin acquired under act of June 3, 1856, the right to the odd or granted sections within the six-mile limits to aid in constructing said roads from and after the dates of survey as marked along the line of said roads on said diagram, and the even-numbered sections within said limits were increased in price to $2.50 per acre from the same dates, respectively.

The right of indemnity from the odd sections within the fifteen-mile limits accrued from and after March 3, 1858, the date of receipt of notice of the election of such odd sections.

In disposing of the even sections within the six-mile limits you will be guided by the dates of survey of the road opposite the tract sought to be entered or located.

106 The odd sections within the fifteen-mile limits can only be disposed of where the party acquired his right to the lands prior to March 3, 1858.

Very respectfully, your obedient servant,

J. M. EDMUNDS,
Commissioner.

Ack'd receipt of diagram Nov. 25, '62.

EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* —, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed, being copies, 1st, of a letter dated May 5, 1865, received in this office from D. A. Baldwin, No 25 Pine street, New York, and 2d, of an enclosure received therewith, are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my hand and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. M. STOCKSLAGER,
Commissioner of General Land Office.

NEW YORK, *May* 5, 1865.

Hon. J. M. Edmunds.

D'R SIR: I herewith enclose the act of the Legislature of
107 Wisconsin conferring upon the St. Croix & Lake Superior R. R. Co. the land granted to said State to aid in building railroads by the acts of Congress approved June 3, 1856, and May 5, 1854, and also the acceptation of said grants by the State.

I wish to renew my request in behalf of said company that the lands be withdrawn from market in compliance of said grants.

Yours truly, D. A. BALDWIN.

25 Pine street.

WASHINGTON, NEW JERSEY, *April* 22, 1865.

At a meeting of the executive committee of the St. Croix & Lake Superior Railroad Company the following resolutions were adopted:

Resolved, That the St. Croix & Lake Superior Railroad Company accept the grant of lands made by Congress to the State of Wisconsin to aid in the construction of the railroad from the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior and to Bayfield, by an act of Congress approved May 5, 1864, and the act of the Legislature of Wisconsin conferring the same on the St. Croix & Lake Superior R. R'd Co. by an act approved March 20, 1865.

Resolved, That the line as now located by maps on file in the Land Office at Washington, D. C., be the line adopted for the selection of lands conferred on this company by said grants.

A. P. BERTHOND,
Pres. St. Croix & Lake Superior R. R. Co.

Attest:

[SEAL.] HARVEY L. CROMWELL,
Secretary St. Croix & Lake Superior R. R. Co.

108 EXHIBIT "E."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* —, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy of a letter addressed to D. A. Baldwin, Esq., No. 25 Pine street, New York, under date of May 10, 1865, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
[SEAL.] *Commissioner of General Land Office.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *May* 10, 1865.

D. A. Baldwin, Esq., No. 25 Pine street, New York.

SIR: I have received your letter of the fifth instant, enclosing a certified copy of an act of the Legislature of Wisconsin, approved May 20, 1865, conferring upon the St. Croix & Lake Superior Railroad Company the grant of lands made to said State by the acts of June 3, 1856, and May 5, 1864, also an acceptance by the said company of the grant, dated the twenty-second ult., which have been placed on the files of this office. In reply to the request contained in your letter for a withdrawal of lands for said road, I would
109 state that supplemental lists of lands for the same were submitted to the Secretary of the Interior on the third instant, and approved by him on the sixth, which, with the land heretofore approved to said State for said road, makes the full quantity of land granted therefor. Certified copies of the supplemental lists will in a few days be transmitted to the Governor of Wisconsin. The grant to Wisconsin for this road being satisfied, no withdrawal can be ordered.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Acting Commissioner.

EXHIBIT "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy of a letter addressed to the register and receiver at Bayfield, Wisconsin, Dec. 10, 1869, ordering a withdrawal for the benefit of the Portage, Winnebago &

Superior railroad, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner General Land Office.*

110 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *December* 10, 1869.

Register and receiver, Bayfield, Wisconsin.

GENTLEMEN: I enclose herewith a diagram of the Portage, Winnebago & Superior railroad, under act of May 5, 1864, third section, and joint resolution twenty-first of June, 1866, with the ten and twenty mile limits of the land grant designated thereon.

You are hereby directed to withdraw from sale or location, pre-emption or homestead entry, all the odd-numbered sections of lands falling within those limits, and to regard as increased in price to $2.50 per acre all the even-numbered sections within the ten-mile or granted limit.

The even sections between the ten and twenty mile limits are not affected by this withdrawal.

The lands herein increased to $2.50 per acre you will dispose of only under the pre-emption and homestead laws and at that ratability, except in case of *bona fide* pre-emption settlement prior to the receipt of this letter of withdrawal. In such cases the settler will, under the provisions of the act of twenty-seventh March, 1854, be permitted to prove up and pay for his land, whether upon odd or even sections, at $1.25 per acre.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge the same by date.

Very respectfully, JOS. S. WILSON,
Commissioner.

(Exhibit "G" omitted.)

111 EXHIBIT "H."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy of a letter addressed to this office March 27, 1883 (together with endorsements thereon), by W. K. Mendenhall, Esq., relative to the fixing of a terminal limit for the grant to the Wisconsin Central railroad, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

WASHINGTON, D. C., *March* 27, 1883.

Hon. N. C. McFarland, Commissioner G. L. Office.

SIR: The Northern Pacific Railroad Company having constructed its line to Superior City, you adjusted in accordance with the Secretary's orders the limits of its grant, also fixing terminal limit.

I would now call your attention to the fact that the terminal limits of the Wisconsin Central railroad at Superior City have never been established. It is now necessary that this be fixed so that the Northern Pacific Company may properly select its lands, and that your office may be able to determine the rights of the two companies. I therefore ask that a terminal line at right angles to the general
112 course of the Wisconsin Central may be established as was done in the case of the Northern Pacific road.

Very respectfully, W. K. MENDENHALL,
Attorney N. P. R. R. Co.

EXHIBIT "I."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy of a letter from W. K. Mendenhall (with endorsements thereon), dated July 3, 1883, enclosing one from Edwin H. Abbott, Esq., together with a copy of Mr. Abbott's said letter, are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

WASHINGTON, D. C., *July* 3, 1883.

Hon. N. C. McFarland, Commissioner G. L. Office.

SIR: Referring to my letter to you of twenty-seventh March last, requesting adjustment of terminal limits of Wisconsin Central r'r'd at Superior, I herewith file a letter to you from the V.-pres. of said company concurring in said request.
113 I therefore ask that such terminal limits may be adjusted without delay.

Very respectfully, W. K. MENDENHALL,
Attorney N. P. R. R. Co.

WISCONSIN CENTRAL RAILROAD COMPANY,
BOSTON, MASS., *July* 2, 1883.

To the honorable commissioner of public lands, Washington, D. C.

DEAR SIR: On behalf of the Wisconsin Central Railroad Company I hereby concur in the request of the Northern Pacific Railroad

Company for the adjustment of the terminal limit in accordance with the rule and principle of your office.

Respectfully yours, EDWIN H. ABBOTT,
Vice-Pres. Wis. Cen. R. R. Co. and Trustee in Possession.

EXHIBIT "J."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copy of office letter of July 12, 1883, to the register and receiver at Bayfield, Wis., transmitting a diagram showing a terminal limit for the withdrawal for the Wisconsin Central railroad, is a true and literal exemplification from the records of this office.

114 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 12, 1883.

Register and receiver, Bayfield, Wisconsin.

GENTLEMEN: It appears that no terminal limit was placed on the diagram of withdrawal for the grant for the Portage, Winnebago & Lake Superior R. R. Co., now Wisconsin Central, transmitted to your office with letter of Dec. 10, 1869, and the withdrawal was made to include lands beyond the actual terminus of the definitely located line of the road.

Under date 27 March last Mr. W. K. Mendenhall, resident attorney for the Northern Pacific R. R. Co. and the Wisconsin Central Co. also, filed a request in behalf of the former for a terminal limit to be fixed for said withdrawal, so that if any lands inure to the grant to the Northern Pacific Co. they can be identified. Under date third instant he filed a letter from Edwin H. Abbot, vice-president of the Wisconsin Central Co., concurring in said request.

Pursuant thereto I transmit herewith a small diagram showing a terminal limit for said withdrawal fixed in accordance with the practice of this office, and you are directed to mark the same on the diagram furnished you in 1869. Lands beyond said limit

115 will be treated as outside the withdrawal from the date of receipt by you of this letter and diagram, which date you will promptly report.

Very respectfully, N. C. McFARLAND,
Commissioner.

(Exhibits "K," "L," and "M" omitted.)

EXHIBIT "N."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copies of the homestead entry papers No. 47, together with endorsements thereon, of Owen Sheridan for the N. E. ¼, sec. 33, T. 49 N., R. 14 W., Wisconsin, are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

Homestead.

RECEIVER'S OFFICE, BAYFIELD, WIS., *Dec.* 2, 1871.

Receiver's receipt No. 47. Application No. 47.

Received of Owen Sheridan the sum of fourteen dollars
116 —— cents, being the amount of fee and one-half the compensation of register and receiver for the entry of northeast quarter of section thirty-three, in township forty-nine of range fourteen west, under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain."

$14.00. J. H. NOURSE, *Receiver.*

Homestead.

LAND OFFICE AT BAYFIELD, WIS., *Dec.* 2, 1871.

Affidavit.

I, Owen Sheridan, of Douglas county, Wisconsin, having filed my application No. 47 for an entry under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear that I am the head of a family and a citizen of the United States; that said application No. 47 is made for my exclusive benefit, and that entry is made for the purpose of actual settlement and cultivation, and not, directly or indirectly, for the use or benefit of any other person or persons whomsoever, and that I have not heretofore had the benefit of this act.

OWEN SHERIDAN.

Sworn to and subscribed this second day of December, 1871, before—

JOHN H. KNIGHT,
Register of the Land Office.

117 *Homestead.*

LAND OFFICE AT BAYFIELD, WISCONSIN,
December 2, 1871.

Application No. 47.

I, Owen Sheridan, of Douglas county, Wisconsin, do hereby apply to enter, under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," the northeast quarter of section (33) thirty-three, in township (49) forty-nine north of range (14) fourteen west, containing (160) one hundred and sixty acres.

OWEN SHERIDAN.

LAND OFFICE AT BAYFIELD, WISCONSIN,
December 2, 1871.

I, John H. Knight, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and there is no prior valid adverse right to the same.

JOHN H. KNIGHT, *Register.*

EXHIBIT "O."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being a copy of the declaratory statement No. 654 of Mary Bardon for the N. E. ¼, sect. 33,
118 township 49, range 14 west, Bayfield land district, Wisconsin, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

$2.00. LAND OFFICE AT BAYFIELD, WIS.,
Feb. 14, 1881.

Mrs. Mary Bardon has this day paid two dollars, the register's and receiver's fees, to file a declaratory statement, the receipt whereof is hereby acknowledged.

ISAAC H. WING, *Receiver.*

No. 654.

Mrs. Mary Bardon, having paid the fees, has this day filed in this office her declaratory statement, No. 654, for N. E. ¼, section 33,

township 49, of range 14 west, containing 160 acres, settled upon Jan. 25, 1881, being offered.

Under the provisions of the pre-emption laws the time within which final proof is required to be made on unoffered lands expires in thirty-three months from date of settlement or from date of filing of township plat in district land office in case of settlement on unsurveyed lands, and on offered lands in twelve months from date of settlement; and under act of March, 3, 1879, notice of intention to prove up must be given by publication in a newspaper, to be designated by the register, for a period of thirty days or in five consecutive issues of said paper, which notice must also contain the
119 names of the witnesses by whom the necessary facts will be established.

Notice is therefore hereby given that this pre-emption filing expires on Jan. 25, 1881, after which date the tract will be subject to the claim of any other qualified party.

Very respectfully, JOHN H. KNIGHT, *Register*.

EXHIBIT "P."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OEFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copies of the pre-emption cash entry papers No. 3698, together with the endorsements thereon, of Mary Bardon for the N. E. ¼ of sec. 33, T. 49, R. 14 W., Bayfield land district, Wisconsin, are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

Certificate as to Posting of Notice.

LAND OFFICE AT BAYFIELD, WIS., *June* 8, 1882.

I, John H. Knight, register, do hereby certify that a notice,
120 a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 1st day of May, 1882.

JOHN H. KNIGHT, *Register*.

LAND OFFICE, BAYFIELD, WIS., *April* 26, 1882.

Notice is hereby given that the following-named settler has filed notice of her intention to make final proof in support of her claim and secure final entry thereof at the expiration of thirty days from the date of this notice, viz., on June 8, 1882, at two o'clock in the afternoon, at the United States land office in Bayfield, Wisconsin,

Mary Bardon, her pre-emption claim for the northeast quarter of section 33, township 49 N., range 14 W., and names the following as her witnesses, viz: Amial E. Philbrooks, Vincent Roy, and Eugene Brown, all of Superior, Douglas county, Wisconsin.

JOHN H. KNIGHT, *Register.*

STATE OF WISCONSIN, } ss:
County of Douglas, }

J. Lute Christie, of said county, being duly sworn, deposes and says that he is the publisher and manager of the Superior Times, a public newspaper printed and published in the town of Superior, in the county and State aforesaid, and that the annexed printed notice was inserted and published in the said newspaper once in each
121 week for 5 weeks successively; and the said notice was first so published on the 6th day of May, 1882, and was last so published on the 3d day of June, 1882.

J. LUTE CHRISTIE.

Subscribed and sworn to before me this 5th day of May, 1882.
[SEAL.] JAMES BARDON,
Notary Public.

LAND OFFICE, BAYFIELD, WIS., *April* 26, 1882.

Notice is hereby given that the following-named settler has filed notice of her intention to make final proof in support of her claim, and secure final entry thereof at the expiration of thirty days from the date of this notice, viz., on June 8, 1882, at 2 o'clock in the afternoon, at the United States land office in Bayfield, Wisconsin, Mary Bardon, her pre-emption claim for the northeast quarter of section 33, township 49 N., range 14 W., and names the following as her witnesses, viz: Amial E. Philbrooks, Vincent Roy, and Eugene Brown, all of Superior, Douglas county, Wisconsin.

JOHN H. KNIGHT, *Register.*

Pre-emption Proof.

(Affidavit required of pre-emption claimant, sec. 2262 of the Revised Statutes of the United States.)

I, Mary Bardon, claiming the right of pre-emption under section 2259, of the Revised Statutes of the United States, to the north-
122 east quarter of section number thirty-three (33), township number forty-nine (49) of range number fourteen (14) west, subject to sale at Bayfield, Wis., do solemnly —— that I have never had the benefit of any right of pre-emption under said section; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the Government of the United

States should inure, in whole or in part, to the benefit of any person except myself.

MARY BARDON.

I, John H. Knight, register of the land office at Bayfield, Wis., do hereby certify that the above affidavit was subscribed and sworn to before me this 8th day of June, A. D. 1882.

JOHN H. KNIGHT, *Register.*

Pre-emption Proof.

(Affidavit required of pre-emption claimant, sec. 2262 of the Revised Statutes of the United States.)

I, Mary Bardon, claiming the right of pre-emption, under section 2259 of the Revised Statutes of the United States, to the north-
123 east quarter of section number thirty-three (33) of township number forty-nine (49) of N. range number fourteen (14) W., subject to sale at Bayfield, Wisconsin, do solemnly swear that I have never had the benefit of any right of pre-emption under said section; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself.

MARY BARDON.

I, Charles Lord, clerk of the circuit court of Douglas county, Wisconsin, do hereby certify that the above affidavit was subscribed and sworn to before me this 12th day of October, A. D. 1886, the judge of this court being absent.

[SEAL.] CHARLES LORD, *Clerk.*

(Testimony of claimant and witness omitted.)

No. 3698.

RECEIVER'S OFFICE AT BAYFIELD, WIS., *June* 22, 1882.

Received from Mary Bardon, of Douglas county, Wis., the sum of two hundred dollars and — cents, being in full for the N. E. ¼ of section No. 33, in township No. 49 N. of range No. 14 W., 4th
124 P. M., containing 160 acres and — hundredths, at $1.25 per acre.

$200. ISAAC H. WING, *Receiver.*

No. 3698.

LAND OFFICE AT BAYFIELD, WIS., *June* 22, 1882.

It is hereby certified that, in pursuance of law, Mary Bardon, re-

siding at ——, in Douglas county, State of Wisconsin, on this day purchased of the register of this office the N. E. ¼ of section No. 33, in township No. 49 N. of range No. 14 west of the 4th principal meridian, containing 160 acres, at the rate of one dollar and twenty-five cents per acre, amounting to 200 dollars and — cents, for which the said Mary Bardon has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Mary Bardon shall be entitled to receive a patent for the lot above described.

JOHN H. KNIGHT, *Register.*

EXHIBIT "R."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1888.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copy of office decision of November 28, 1883, in the case of The Northern Pacific R. R. Co. *vs.* Mary Bardon, involving the N. E. ¼ sec. 33, T. 49, R. 14 west, Bayfield land district, Wis., is a true and literal exemplification from the records of this office.

125 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

Cash 3698. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov* 28, '83.

Register and receiver, Bayfield, Wis.

GENTLEMEN: Mary Bardon filed D. S. 654 for N. E. ¼ 33, 49, 14 W., Feb. 14, 1881, alleging settlement Jan. 25, 1881, and made cash entry 3698 thereon June 22, 1882.

Said tract is within the six miles granted limits of the act of June 3, 1856, for the benefit of the St. Croix and Lake Superior, now Chicago, St. Paul, Minneapolis and Omaha R. R. Co.

The withdrawal was ordered by telegram May 29, 1856, and public notice dated June 12, 1856, continued the withdrawal.

The right of said road to the grant attached Nov. 2, 1857.

The records of this office show that James Robinson, Jr., filed D. S. 107 for said tract Sept. 21, 1855, alleging settlement Sept. 12, 1855, and proof was made thereon by his heirs under cash entry 429, July 30, 1857.

Said cash entry was cancelled Aug. 5, 1865, for failure to furnish proof of residence upon said tract between April 25, 1856, date of making pre-emption proof, and July 30, 1857, date of administrator's oath.

126 Owen Sheridan made h'd entry 47 for same tract Dec. 7, 1871, and it was canceled Jan. 30, 1880. Louis J. Lemoit filed D. S. 660 for same tract May 2, 1881, alleging settlement April 3, 1881.

As the cash entry by the heirs of James Robinson, Jr., deceased, was existing on said tract at the date of the attachment of the rights of said road, viz., Nov. 2, 1857, and was not cancelled until Aug. 5, 1865, I think the tract was excluded from said grant.

The above-mentioned tract is also within the twenty-mile limits of the act of July 2, 1864, for the benefit of the Northern Pacific R. R. Co., but being within the granted limits of the act of 1856, for the benefit of the St. Croix & Lake Superior R. R. Co., I think the tract is therefore excluded from said grant.

The cash entry by Miss Bardon is therefore this day held for approval subject to appeal by the R. R. Co.'s companies.

Notify all parties in interest hereof and at the proper time report any action taken.

The resident attorney for the Northern Pacific R. R. Co. will be notified by this office.

Very respectfully, N. C. McFARLAND,
Commissioner.

(Exhibit "S" omitted.)

127 EXHIBIT "T."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 17, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed, being copy of decision (together with endorsement thereon) of Aug. 10, 1886, by the honorable Secretary of the Interior in the case of The Northern Pacific R. R. Co. *vs.* Mary Bardon, involving the N. E. ¼ sec. 33, T. 49, R. 14 W., Bayfield land district, Wis., is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

WM. A. J. SPARKS,
[SEAL.] *Commissioner of General Land Office.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 10, 1886.

Vol. 4, No. 698.

NORTHERN PACIFIC R. R. Co. *vs.* MARY BARDON. } Railroad Grant and Preemption Contest.

The Commissioner of the General Land Office.

SIR: I have considered the case of The Northern Pacific Railroad

Company *vs.* Mary Bardon, on appeal by said company from your office decision of November 28, 1883, involving the N. E. ¼ of sec. 33, T. 49, R. 14 W., Bayfield district, Wisconsin.

128 Without entering into a discussion of the numerous points involved in this case, it will be sufficient to say that Bardon having filed in the local office notice of her intention to prove up her claim, and said notice having been duly advertised (April 26, 1882), and she having in accordance therewith appeared at the time and place advertised (June 8, 1882), and submitted satisfactory proof without objection from said railroad company, it is too late for said company to question her claim to the land. (See Atlantic & Pacific R. R. Co. *vs.* Forrester, 1 L. D., 481; same *vs.* Buckman, 3 L. D., 276; St. P., M. & M. R. R. *vs.* Cowles, 3 L. D., 226.)

I therefore affirm your office decision of Nov. 28, 1883, holding Mary Bardon's cash entry for approval.

I return herewith the papers transmitted with your letter of May 29, 1884.

Very respectfully, H. L. MULDROW,
Acting Secretary.

(Exhibits "U," "V," "W," and "E" omitted.)

129 On this 25th day of February, in the December term, A. D. 1889, of said court, in the record and proceedings thereof in said entitled cause, before the Honorable Romanzo Bunn, judge, is the following entry:

Decree.

130 United States Circuit Court for the Western District of Wis.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
MARY BARDON. } In Equity.

This cause came on to be heard at this term of the court and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

That the Northern Pacific Railroad Company is the owner in fee simple and entitled to the possession of the northeast quarter of section numbered thirty-three, in township numbered forty-

131 nine north of range numbered fourteen west, in Douglas county, State of Wisconsin.

That Mary Bardon, the defendant, did not by her pre-emption filing made upon and the entry thereunder of said land and the issuance in pursuance of said pre-emption entry of the patent, dated January 19th, A. D. 1887, acquire any right, title, or interest in or to said land.

That said patent be, and is hereby, declared null and void, and that said patent be delivered within sixty days by the said Mary Bardon to the clerk of this court for cancellation.

That the said defendant deliver to the said complainant
132 the possession of said property, and said defendant is perpetually enjoined from asserting or claiming any right, title, or interest in or to said property under or by virtue of said preemption entry and patent.

It is considered that said complainant have and recover *to* and from said defendant its costs, taxed at $49.75, and that execution be issued therefor.

Dated Feb'y 25, 18889.

R. BUNN, *Judge.*

(Endorsed:) Filed Feb'y 25, 1889. F. M. Stewart, cl'k.

133 And afterwards, to wit, on the 61st day of said term, to wit, on the 7th day of March, A. D. 1889, the following proceedings were had, to wit:

Appeal.

This day came the defendant, by her counsel, and prayed an appeal to the Supreme Court of the United States as follows, to wit:

134 United States Circuit Court, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
MARY BARDON. } In Equity.

To the honorable Supreme — of the United States:

The appeal of Mary Bardon, the above-named defendant and appellant, respectfully showeth—

That upon the sixth day of December, A. D. 1887, the above-named complainant filed *his* bill in the circuit court of the United States for the western district of Wisconsin, in the seventh circuit, against the above-named defendant and appellant, alleging
135 that the defendant had received a patent from the United States of the northeast quarter of section numbered thirty-three, in township forty-nine of range numbered fourteen west, and thereby became the owner of the legal title to said tract of land, while the right to said title and the whole equitable interest therein was in the complainant and appel-ee by reasons of the averments and allegations in the complainant's said amended bill contained, which the defendant and appellant denied in her answer, wherein she set forth the averments and facts tending to show that the equitable title as well as the legal title to said tract of land was
136 absolutely vested in her in fee simple; and the parties to said action, by their respective counsel, thereafter, between the 6th day of December, A. D. 1887, and the second day of November, 1888, did agree upon all the facts in controversy between said parties and did file a stipulation in said court, whereby all the facts upon which said controversy depended were set forth and embodied in connection with the pleadings in said cause; and thereafter, on the

second day of November, A. D. 1888, said cause was duly argued, tried, and submitted upon the pleadings and facts stipulated and agreed to as aforesaid and taken under advisement by
137 the court.

That on the 25th day of February, 1889, a final decree was made and pronounced in said cause, wherein it was in substance decreed that the complainant is the owner in fee simple and entitled to the possession of the said northeast quarter of section number thirty-three, in township numbered forty-nine north of range numbered fourteen west, in Douglas county, State of Wisconsin, and that the said patent issued to the defendant by the United States be declared null and void, and that said patent be delivered within sixty days by the said Mary Bardon to the clerk of the court for
138 cancellation, and that the defendant deliver to the said complainant the possession of said property and be perpetually enjoined from assisting or claiming any right, title, or interest in or to said property by virtue of her pre-emption entry and patent.

Wherefore this appellant appeals from the whole of said decree of the said circuit court to the United States, and respectfully prays that the decree of the said circuit court and the bill, answer, pleadings, stipulation, & evidence, maps, plats, & exhibits and all proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court
139 will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made dismissing said amended bill of complaint with costs, or such other decree as to the said Supreme Court may seem just.

JOHN B. SANBORN,
E. L. JOHNSON,
Solicitors for Appellant.

JOHN B. SANBORN, *Of Counsel.*

(Endorsed:) Filed M'ch 7, 1889. F. M. Stewart, cl'k.

140 *Appeal Allowed.*

Whereupon it is ordered by the court that the appeal be, and hereby is, allowed, and that a bond for supersedeas, to be approved by the court, be given with sureties in the penalty of five hundred dollars. It is further ordered that the clerk transmit to the Supreme Court with transcript of the record herein the original maps, plats, &c., on file in said cause.

Bond for supersedeas filed as follows:

141 United States Circuit Court, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
MARY BARDON.

Know all men by these presents that we, Mary Bardon, as princi-

pal, and James Bardon and Vincent Roy, as sureties, all of Douglas county, in the State of Wisconsin, are held and firmly bound to the Northern Pacific Railroad Company in the penal sum of five hundred dollars, lawful money of the United States; to the payment whereof, to be well and truly made, we and each of us do hereby bind ourselves, our and each of our heirs, executors, admin-
142 istrators, and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that whereas Mary Bardon, the principal herein, has appealed to the Supreme Court of the United States — for the western district of Wisconsin made and entered in the above-entitled action on the 25th day of February, A. D. 1889:

Now, therefore, if the said Mary Bardon shall prosecute her appeal to final judgment in said Supreme Court of the United States and pay all damages and costs sustained by the appellee, The Northern Pacific Railroad Company, by reason of said ap-
143 peal, then this obligation shall be void; but otherwise shall remain in full force and effect.

In witness whereof we and each of us have hereto set our hands and seals this 2 day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

MARY BARDON. [SEAL.]
JAMES BARDON. [SEAL.]
VINCENT ROY. [SEAL.]

Signed — sealed in presence of—
JNO. C. BERTRAND.
EDWIN SODERLAND.
JOHN A. BARDON.

STATE OF WISCONSIN, } ss:
County of Douglas, }

Be it remembered that on this second day of March, A. D.
144 1889, personally appeared before me Mary Bardon and James Bardon and Vincent Roy, to me known to be the identical persons who executed the foregoing bond, and each *of* acknowledged that they executed the same as their free act and deed.

JOHN A. BARDON,
Notary Public, Douglas Co., Wis.

STATE OF WISCONSIN, } ss:
County of Douglas, }

James Bardon and Vincent Roy, being first duly sworn, deposes and says, each for himself, that he is one of the sureties to the foregoing bond; that he is a resident and freeholder of the
145 State of Wisconsin and is worth the sum of one thousand dollars over and above all his debts and liabilities, exclusive of all property exempt from execution.

JAMES BARDON.
VINCENT ROY.

Sworn to and subscribed before me this 2 day of March, A. D. 1889.

JOHN A. BARDON,
Notary Public, Douglas Co., Wis.

Endorsed: March 7, 1889. This bond approved as a supersedeas. R. Bunn, judge. Filed March 7, 1889, and citation issued.

146 UNITED STATES OF AMERICA, } ss:
Western District of Wisconsin, }

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original records and proceedings in said cause now remaining on file and of record in my office, and that it is a correct transcript therefrom, and also a true copy of the security on appeal and the citation and admission of service thereon; also original maps and plats ordered to be sent, along with transcript of record, to Supreme Court.

In testimony whereof I have hereunto set my hand and
147 affixed the seal of said circuit court, at my office, in Madison, this 18th day of March, A. D. 1889, and of our Independence the one hundred and thirteenth.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

148 United States Circuit Court, Seventh Circuit, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
MARY BARTON, Defendant. } Citation.

By the Honorable R. Bunn, one of the judges of the circuit court of the United States for the western district of Wisconsin, to The Northern Pacific Railroad Company, appellee:

Whereas Mary Bardon has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the western district of Wisconsin, made in favor of you, the said The Northern Pacific Railroad Company, and has filed the security required by law, you are therefore hereby cited to appear before the Supreme Court, at the city of Washington, on the second Monday of October next, being the 14th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Madison, in the western district of Wisconsin, in the seventh circuit, this 7 day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

R. BUNN,
Judge of Circuit Court.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I hereby certify that the foregoing is a true copy of the citation in above-entitled case.

Seal Circuit Court. Witness my hand and seal of court, at Madison, March 7th, 1889.

F. M. STEWART, *Clerk.*

149 [Endorsed:] United States circuit court, seventh circuit, western district of Wisconsin. Northern Pacific Railroad Co., complainant, *vs.* Mary Bardon, defendant. Citation. Service is hereby admitted this eighth day of March, A. D. 1889, of a copy of the appeal by Mary Bardon, def't, to the Supreme Court of the United States, of a copy of the order allowing the appeal, a copy of the bond & order of supersedeas thereon, and of the citation in said cause to the Northern Pacific Railroad Company. James McKnight, solicitor & of counsel for Northern Pacific Railroad Company. John B. & W. H. Sanborn, attorneys for defendant, St. Paul, Minn.

Endorsed on cover: W. Wisconsin C. C. U. S. No. 762. Mary Bardon, appellant, *vs.* The Northern Pacific Railroad Company. Filed March 27, 1889.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES H. McKENNEY,
CLERK

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

NO. .....

MARY BARDON,

Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR MARY BARDON.

JOHN B. SANBORN,
Of Counsel for Appellant.

PIONEER PRESS, ST. PAUL, MINN.

THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1891.

No.....

MARY BARDON,
Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF FOR MARY BARDON.

POINTS OF FACT MATERIAL.

I.

This action was originally brought by the respondent in the circuit court for the county of Douglas and State of Wisconsin, afterward removed to the United States circuit court for the western district of Wisconsin, where the action was tried. The action is one in

equity, and brought to have the right, title and interest acquired by the appellant by virtue of a patent to her from the United States in and to the northeast quarter (NE ¼) of section thirty-three (33), township forty-nine (49), range fourteen, West (14 W), in the State of Wisconsin, alleged to be of greater value than eight thousand dollars, and in fact many times that value, ad judged and decreed to have been acquired and to be held by her in trust, for the use and benefit of the Northern Pacific Railroad Company, and to have the appellant adjudged and decreed to convey said right, title and interest in said parcel of land to said corporation by a good and sufficient deed, or in lieu thereof a commissioner to be appointed to convey the same to the said respondent, plaintiff below.

The contention of the appellant is, that the United States did not have full title to the tract of land in controversy, and that the same was sold, granted and otherwise appropriated by the United States prior to, and when the grant to the respondent was made, and has remained in that condition from July 2, 1864, to this time, and is of that class of lands in odd sections excluded from the grant by its express terms.

II.

It is admitted that the said tract of land lies within the place limits of the grant of lands by Congress to said railroad company, and that the title thereto would pass to said company by reason of the grants made by Congress to, and the compliance with the conditions thereof by, said corporation, unless excepted from said grant by reason of the facts set forth and admitted in

the pleadings and stipulated and admitted to exist, as the same appear in the Record. (See Stipulation No. 41, page 38, Record.)

III.

The said northeast quarter of section thirty-three, township forty-nine, range fourteen, West, in the State of Wisconsin, was a part of the public domain, duly surveyed and subject to sale by pre-emption and otherwise on and prior to Sept. 12, A. D. 1855. (See Stipulation 1, Record.)

IV.

On the third day of June, 1856, Congress made a grant of land to the State of Wisconsin in the following words:

"*Be it enacted*," etc., "that there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*, that the lands to be so

located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: *Provided further*, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way shall only be granted, subject to the approval of the president of the United States."

United States Statutes at Large, vol. 11, p. 20.

V.

On the fifth day of May, 1864, Congress made a further grant to the State of Wisconsin in the following words:

"*Be it enacted*," *etc.*, "that there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad to be selected by said state, to Bayfield, every alternate section of public lands designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose, by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any section or parts thereof granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the secretary of the interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in

lieu of those sold and to which pre-emption or homestead right has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid: *Provided*, that the land to be so located shall in no case be further than twenty miles from the line of said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June three, eighteen hundred and fifty six, should any such deficiency exist."

United States Statutes at Large, vol. 13, p. 66.

VI.

The said northeast quarter of section thirty-three, township forty-nine, range fourteen, is within the six miles granted limits of the act of June 3, 1856, made as aforesaid to the State of Wisconsin for the benefit of the St. Croix & Lake Superior, afterwards the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, and the withdrawal of the lands included in said grant was published by telegram, May 29, 1856, and public notice, dated June 12, 1856, continued the withdrawal, and at the same time the western limit of said grant to the State of Wisconsin was fixed by the commissioner of the general land office and the secretary of the interior at the easterly bank of the St. Louis river as the same runs south from the west end of Lake Superior. (See Record, page 51, and also Stipulations numbered 9, 10 and 11, folio 93, of the Record.)

VII.

On Nov. 8, 1862, the commissioner of the general land office forwarded to the register and receiver of the United States land office at Bayfield, Wisconsin, in which said tract is situated, a diagram showing the line

of definite location of the said St. Croix & Lake Superior Railroad, with the six and fifteen mile limits of the land grant designated thereon, and the same appears as Exhibit "B" in the Record (see Stipulations 9 and 12 in the Record), and the western terminus thereof was the St. Louis river.

VIII.

On March 5, 1857, the State of Wisconsin, by an act on that day approved, granted all the lands which had been granted to said state by the acts aforesaid to the St. Croix & Lake Superior Railroad Company, a corporation duly organized and existing under the laws of said State of Wisconsin, and on the second day of November, 1857, said St. Croix & Lake Superior Railroad Company duly filed with the secretary of the interior a map or diagram of its line of railroad as definitely fixed, and the said tract of land was within six miles of said line so definitely fixed by said map or diagram (see folio 66 of the Record), and all lands so granted and conveyed have since been earned by and conveyed to said company and its successors, except so much of the same as lies west of a line drawn north and south through the mouth of the Nemagi river.

IX.

On the second day of July, 1864, Congress incorporated and made a grant of lands to the "Northern Pacific Railroad Company" and authorized and empowered said company:

"To lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or

Wisconsin; thence westerly, by a most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus."

And vested said company with all the powers, privileges and immunities necessary to carry into effect the purposes of the said act as therein set forth.

United States Statutes at Large, vol. 13, p. 366.

X.

At the same time Congress made a grant of public lands to said company in the following words:

"*And be it further enacted*, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed and the plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, that the railroad company receiving the previous grant of

land may assign their interest to said 'Northern Pacific Railroad Company' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

United States Statutes at Large, vol. 13, pp. 367, 368, sec. 3 of the Act.

XI.

Section six of the same act is in the following words:

"*And be it further enacted*, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homestead to actual settlers on the public domain,' approved May 20th, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved, alternate sections shall not be sold by the government at a price less than two dollars and fifty cents, per acre, when offered for sale."

United States Statutes at Large, vol. 13, p. 369, sec. 6.

XII.

Section eight of the same act is in the following words:

"*And be it further enacted*, that each and every grant, right, and privilege herein are so made and given to, and accepted by, said 'Northern Pacific Railroad Company' upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the

president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-six."

United States Statutes at Large, vol. 13, p. 370, sec. 8.

XIII.

On the thirty-first day of May, 1870, Congress further enacted as follows in relation to the grant to the Northern Pacific Railroad Company:

"And in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the *final location thereof*, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in said state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of 1864, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixy-four."

United States Statutes at Large, vol. 16, p. 379.

XIV.

On the twelfth day of September, 1855, James S. Robinson, Jr., who was then and there a qualified pre-emptor, made a pre-emption settlement upon said tract of land (see Stipulation 2, folio 91 of the Record); and thereafter, on the twenty-first day of September, 1855, filed his declaration of settlement upon said tract of land, under the pre-emption laws of the United States, with the register and receiver of the proper land office of the United States (page 32, folio 91, Record): and having died between that date and July 30, 1857, his heirs made final proofs and payment

for said land and received the receipt of the receiver therefor and a certificate from the register. (Folio 91, page 32, and folios 103, 104, page 39, Record). And said tract of land remained so subject to said pre-emption claim and sold to the heirs of said James S. Robinson, Jr., and the money remained in the treasury of the United States until Aug. 5, 1865, when said pre-emption entry was canceled and said money was refunded to said heirs.

XV.

The grants made by Congress to the State of Wisconsin which were transferred by said state to the St. Croix & Lake Superior Railroad Company and its successor were all earned prior to the commencement of this action except such as lie west of a line drawn north and south through the mouth of the Nemagi river, leaving six miles of the westerly portion of said grant unearned by said companies. (See folio 80 of defendant's answer and Stipulations 24 and 25, folio 97, of the Record.)

XVI.

On Dec. 2, 1871, Owen Sheridan made homestead application No. 47 to enter said tract of land, and was permitted to make a homestead entry of the same, which entry was afterwards canceled on the thirtieth day of June, 1880. (See folios 98 and 117, Stipulation 28.)

XVII.

On the twenty-fifth day of January, 1881, the appellant, Mary Bardon, made her pre-emption settlement

upon said tract of land, and on Feb. 14, 1881, filed her declaratory statement No. 654 therefor; and on the eighth day of June, 1882, made her final proofs, and on the twenty-second day of June, 1882, made her entry of and payment for said tract of land. (See Stipulation No. 30, folio 99, and folios 120, 121, 122, 123 and 124 of the Record.)

XVIII.

On the nineteenth day of January, 1887, the secretary of the interior of the United States issued to said defendant a patent for said land, in form provided by law. (See Stipulation 34, folio 101 and Exhibit "U.")

XIX.

The Northern Pacific Railroad Company did not definitely fix the line of its said road in Wisconsin, and file a plat thereof in the office of the commissioner of the general land office prior to July 6, A. D. 1882, on which date said corporation duly made out and filed in the office of the secretary of the interior of the United States a map or diagram, showing the line of definite location of all that part of its said line of railroad which lies within the State of Wisconsin, which had that year, for the first time, actually been made by the respondent upon the ground, but one or two diagrams of general route had previously been made and filed, upon which withdrawals of land included in the grant had been made. (See folio 61, page 17, folio 102, page 38.)

XX.

A full hearing was accorded the respondent upon the merits of the controversy between the appellant and re-

spondent by the commissioner of the general land office, and a final decision rendered by him thereon on the twenty-eighth day of November, 1883, from which the Northern Pacific Railroad Company appealed to the secretary of the interior, and the decision of the commissioner was duly affirmed, and the appellant's cash entry approved and patented. (See folios 58, 59 and 60.)

XXI.

The department of the interior has made several withdrawals of the lands granted by Congress, which, if the tract in controversy has ever been granted, would withdraw it from sale, pre-emption or other disposition.

First — Withdrawal of May 29, 1856, public notice of which was given June 10, 1856.

Second — Map of definite location of the St. Croix & Superior Railroad, filed in the interior department Nov. 5, 1857.

Third — Map of definite location of the St. Croix & Lake Superior Railroad Company and the Portage, Winnebago & Superior Railroad Company on the fifth day of November, 1857.

Fourth — Withdrawal of Nov. 8, 1862, by the commissioner of the general land office transmitting to the register and receiver of the United States land office of Bayfield, Wisconsin, a diagram showing the line of definite location of the St. Croix & Lake Superior Railroad, with the six and fifteen mile limits of land grant designated thereon. (See Stipulation 12 and Exhibit "C," pages 34 and 40 of the Record.)

Fifth — On Sept. 7, 1869, by the map of definite location of the Portage, Winnebago & Superior Railroad

Company being filed with the secretary of the interior and in the office of the commissioner of the general land office. (See Stipulation 19 of the Record.)

Sixth—On Dec. 10, 1869, by the communication of the secretary of the interior, the transmission of a diagram of the line of the Portage, Winnebago & Superior Railroad with the ten and twenty mile limits of the land grant of said railroad company, designated thereon, and the withdrawal from sale, location, pre-emption or homestead entry of all *odd numbered* sections of land falling within said limits. (See Stipulation 20, page 42 of Record, Exhibit "F.")

Seventh—The withdrawal of March 9, 1865, on account of the grant to the Northern Pacific Railroad Company as preliminary to the final survey and location of said railroad.

Eighth—The withdrawal of Sept. 15, 1870, upon the filing of the map of the general route of the Northern Pacific Railroad.

Ninth—July 6, 1882, filing of the diagram and map of the Northern Pacific Railroad Company with the commissioner of the general land office showing the line of *definite location*. (Pages 16 and 17 of the Record.)

XXII.

The tract of land in controversy, then, has been subject to all such rights as result from said grants, withdrawals and the following facts transpiring at the following dates, viz.:

Pre-emption settlement by James Robinson, Jr., Sept. 21, 1855.

Cash entry and sale of the same by the United States to the heirs of James Robinson, Jr., under said pre-emption settlement, July 30, 1857, which settlement, entry and sale remained undisturbed until Aug. 5, 1865, when the same was canceled and the money refunded to the heirs of James Robinson, Jr.

Grant to the State of Wisconsin for the purpose of aiding in the construction of railroads, June 3, 1856, and the withdrawal by the interior department from public lands subject to sale under said grant of May 29, 1856; public notice of which was given June 12, 1856.

Filing in the interior department the map of the definite location of the St. Croix & Superior Railroad on the fifth of November, 1857, and withdrawal by the terms of the grant unless previously withdrawn.

Additional grant to aid in the construction of railroads to the State of Wisconsin, May 5, 1864.

Map of definite location filed with the commissioner of the general land office by the railroad company, Sept. 7, 1869.

Map of general route by the Northern Pacific Railroad Company as preliminary to a final survey filed March 9, 1865.

Filing of a diagram showing designated route of the Northern Pacific Railroad, Sept. 15, 1870.

Filing of diagram showing *the line of definite location* by Northern Pacific Railroad Company, July 6, 1882.

Owen Sheriden, homestead entry, Dec. 7, 1871. Said tract remaining subject to said entry until May 2, 1881, when the said entry was canceled.

Pre-emption settlement of the appellant, Jan. 25, 1881.

Cash entry and sale under said settlement, June 22, 1882.

Confirmation of said entry by commissioner of general land office on appeal by Northern Pacific Railroad Company, Nov. 28, 1883.

Order of secretary of the interior fixing terminal limit of grant of 1856 to Wisconsin as it pertains to the completed road under said grant, July 12, 1883, modifying the order of the commissioner of the general land office and the secretary of the interior of May 29, 1856, whereby the said western limit of said grant was fixed at the easterly bank of the St Louis river as the same runs south from the west end of Lake Superior. (See Stipulation 10, page 33, Record.)

Confirmation of the secretary of the interior of the pre-emption entry of Mary Bardon on appeal by Northern Pacific Railroad Company, Aug. 10, 1886.

Patent of United States to Mary Bardon, appellant, Jan. 19, 1887. (See Stipulation 34.)

ASSIGNMENT OF ERRORS.

The said Mary Bardon, appellant, says:

First—That in giving the decree aforesaid, in the Record aforesaid contained, there is manifest error in this, to-wit: that the said circuit court of the United States for the western district of Wisconsin, finding and perceiving that the said northeast quarter of section thirty-three, township forty-nine, range fourteen, west, in the State of Wisconsin had been surveyed by the United States and was a portion of the public lands of the United States on and prior to Sept. 12,

1855, and that one James S. Robinson, Jr., on that day made a pre-emption settlement upon said land and thereafterwards, on the twenty-first day of September, 1855, filed his declaration of settlement upon said tract of land, and thereafterwards, said Robinson having died prior thereto, his heirs, on the thirtieth day of July, 1857, made final proofs and entry and paid for said lands to the United States, and received the receiver's receipt therefor and a certificate from the register of the entry thereof, which entry and sale remained in full force until the fifth day of August, 1865, did nevertheless find the fact to be that the United States had full title to and had not reserved, sold, granted or otherwise appropriated said land on the date of the grant of lands to the Northern Pacific Railroad Company, viz.: July 2, 1864.

Second— And there is also error in this, that the said circuit court of the United States for the western district of Wisconsin, finding and perceiving that said northeast quarter of section thirty-three, township forty-nine, range fourteen, West, in the State of Wisconsin, was on the twenty-fifth day of January, 1881, a portion of the public lands of the United States, subject to pre-emption and homestead settlement and entry, and that on the twenty-fifth day of January, 1881, the appellant herein settled upon said tract and thereafter, on Feb. 14, 1881, filed her declaratory statement therefor, and afterwards complied with all the provisions of the pre-emption law, and paid for said land in the manner provided by law and received a certificate of entry and patent therefor from the United States, did, nevertheless, adjudge and decree that she had taken

said land in trust for the Northern Pacific Railroad Company, and had no right, title or interest therein, and did not thereby acquire any right, title or interest in or to said land.

Third—And there is manifest error in this, to-wit: that the said circuit court of the United States for the western district of Wisconsin, finding and perceiving that the Northern Pacific Railroad Company had appeared before the commissioner of the general land office and had a full hearing upon the merits of the controversy between the appellant, Mary Bardon, and said corporation, growing out of all the facts and law pertaining to said title, after full consideration did render his decision thereon, that the said cash entry of the appellant should be held for approval subject to appeal by said corporation, and that said appeal was duly taken to the secretary of the interior and by him duly affirmed; whereupon said appellant did receive from the United States a patent for said land, transferring to and vesting in her a full legal title thereto, did, nevertheless, adjudge and decree that the appellant did not by her pre-emption filing made upon, and the entry thereafter of said land and the issuance in pursuance of said pre-emption entry of the patent dated Jan. 19, 1887, acquire any right, title or interest in or to said land, and that said patent be declared null and void and that said patent be delivered within sixty days to the clerk of said court for cancellation.

Fourth—And there is manifest error in this, to-wit: that the court below, finding and perceiving, and the parties to the action admitting the facts to be, that when the right to lands in the State of Wisconsin was

granted by Congress to the Northern Pacific Railroad Company, the tract in controversy had been sold by the United States to the heirs of James Robinson, Jr., under and by virtue of his pre-emption claim instituted in 1855, and could not, therefore, be any portion of the land the right to which was granted to said company, and was a portion of the public land in an odd section specially excepted from said grant, did, nevertheless, adjudge and decree that said tract was a portion of the lands the right to which was included in said grant to said Northern Pacific Railroad Company.

Fifth—And there is manifest error in this, to-wit: that the court below, finding and perceiving that said tract of land had been sold under the pre-emption laws, and that the money received in payment thereof was in the treasury of the United States on the second day of July, A. D. 1864, when Congress granted the right to certain lands in odd sections in Wisconsin to the Northern Pacific Railroad Company, and that said tract of land was subject to the pre-emption claim of the appellant on July 6, 1882, when the Northern Pacific Railroad Company for the first time filed with the commissioner of the general land office of the United States a map or diagram showing the line of definite location by said company of all that part of said line of railroad which lies within the State of Wisconsin, did, nevertheless, adjudge and decree that said tract of land was a portion of the public lands to which, on the line of said road, the United States had full title not reserved, sold, granted or otherwise appropriated, on said second day of July, A. D. 1864, and free from pre-emption and other claims and rights at the time said line of said

road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

Sixth—And there is manifest error in this, to-wit: that the United States circuit court for the western district of Wisconsin, finding and perceiving, and the parties to said suit admitting the facts to be, that the said northeast quarter of section thirty-three, township forty-nine of range fourteen, West, was part of an odd section of land within the six mile limit of the line of the St. Croix & Lake Superior Railroad Company, now the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, which line of road was definitely located and a map thereof duly filed with the secretary of the interior on the fifth day of November, A. D. 1857, and was within the limits of the public lands of the United States, to which the odd sections were granted to Wisconsin on the third day of June, A. D. 1856, and on the fifth day of May, A. D. 1864, and had been withdrawn from sale by the commissioner of the general land office on June 12, 1856 and Dec. 10, 1869, under said grants, did, nevertheless, find, hold and adjudge that the said tract of land was not subject to any grant, and was not otherwise appropriated on the second day of July, A. D. 1864, when the grant of the right to lands in Wisconsin was made to said Northern Pacific Railroad Company, nor on the fifteenth day of August, 1870, when the map of general route was filed, nor on the eighteenth day of September, A. D. 1882, when the map of definite location of respondent's road was filed in the general land office, and was of the class of public lands included in said grant, when, by the terms of the law, it was of a class excluded therefrom.

Seventh—And there is manifest error in this, to-wit: that the court below, finding and perceiving that the pre-emption claim of the appellant on said tract of land was not made until Jan. 25, 1881, and the entry on said settlement was made on the twenty-second day of June, 1882, and that Congress, by the act of April 21, 1876, did enact as follows, viz.:

"That all such pre-emption and homestead entries which may have been made by permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grant, shall be deemed valid, and a compliance with the laws, and the making of the proof required shall entitle the holder of such claim to a patent therefor."

Vol. 19, U. S. Statutes at Large, pp. 35, 36.

Did, nevertheless, adjudge and decree that said pre-emption entry of the appellant should be deemed invalid and not a compliance with the laws, and should not entitle the holder of such claim to a patent therefor.

Eighth—And there is manifest error in this, to-wit: that the said circuit court of the United States for the western district of Wisconsin did give the decree aforesaid, against the appellant and in favor of the Northern Pacific Railroad Company; whereas, by the law of the land the same should have been given in favor of the said appellant and against the Northern Pacific Railroad Company, and said bill should have been adjudged to be dismissed.

Wherefore, etc.

ON THE LAW.

The question to be determined is, whether the tract of land in question was granted to the respondent by the act of Congress of July 2, 1864, or has vested in

the respondent as the result of withdrawals and other acts of the officers of the executive department of the United States under or by virtue thereof. The contention of the appellant is, that the said tract of land is excepted from the grant to the respondent.

First—By reason of the uncanceled entry and of the pre-emption settlement of James Robinson, Jr., and the entry and the payment therefor by his heirs, which sale was effectual and valid long after the date of said grant. It was land to which the United States had not full title; it was subject to a pre-emption claim; it was sold; it had been before granted by the United States.

Second—That the tract is excepted from the grant to the respondent by reason of falling within the limits of the grant of 1856, to the State of Wisconsin, which grant was vested in the St. Croix & Lake Superior Railroad, and the withdrawals by the commissioner of the general land office and secretary of the interior under said grant.

Third—That the said tract is excepted from the grant to the complainant for the reason that it fell within the limits of land granted in place to the State of Wisconsin on May 5, 1864, which was afterwards granted by said state to the St. Croix & Lake Superior Railroad Company.

Fourth—That the said tract is excluded from the grant to the complainant because of the withdrawal of lands granted to the State of Wisconsin, and by said state vested in the Portage, Winnebago & Superior Railroad Company, and the withdrawals thereunder of Dec. 10, 1869.

Fifth—That if said land was included in the grant to the respondent, that the respondent is now estopped from contesting the claim of the defendant by reason of its failure to appear before the local land officers and assert its rights at the date of the final proof and entry by the appellant.

Sixth—That the defendant's entry of said tract of land is valid by virtue of the act of Congress of April 21, 1876, authorizing the pre-emption and sale of such lands by settlers and the selection of lands in lieu thereof by the respondent within the indemnity limits.

I.

The parties to this action are agreed upon most of the principles of law governing land grants by Congress to aid in the construction of railroads, and the great contention seems to be as to what particular principles are applicable to the precise facts of this case. There is no controversy upon the proposition:

First—That it is a principle applicable to every grant that it cannot affect pre-existing titles.

Although a grant is conclusive on its face and cannot be controverted, yet if the thing granted was not in the grantor no right passes to the grantee.

New Orleans v. *De Armas*, 9 Pet. 225.
New Orleans v. *U. S.*, 10 Pet. 662.
Lindsley v. *Miller*, 6 Pet. 666.
Stoddard v. *Chambers*, 2 How. 284.
Brown v. *Hooker*, 21 How. 305.
Rice v. *R. R. Co.*, 1 Black, 358.
U. S. v. *Arredondo*, 6 Pet. 738.

II.

All grants of land made by Congress in the words, "That there be and is hereby granted," etc., are grants *in presenti* and pass the title to the grantee at once of the lands to be afterwards located. Filing the map of definite location of route simply makes their location certain and has the effect only of determining finally and definitely what was granted by the act. The grant cannot be enlarged or diminished by the grantee. It can depend upon no conditions except such as are named in the act. The grants to the State of Wisconsin in 1856 and May, 1864, and the grant to the Northern Pacific on July 2, 1864, are grants of this class.

Schulenberg v. *Harriman*, 2 Dillon, 398.
Schulenberg v. *Harriman*, 21 Wall. 44.
Wood v. *The Railroad Company*, 104 U. S. 329.
Van Wyck v. *Knevals*, 106 U. S. 360.
Shepley et al. v. *Cowen et al*, 1 Otto, 330.
Rice v. *Railroad Company*, 1 Black, 358.
Leavenworth, Lawrence & Gal. R. R. Co. v. *U. S.*, 2 Otto, 733.
Buttz v. *Northern Pac. R. R. Co.*, 119 U. S. 55.

III.

All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. What is not granted either expressly or by necessary implication is withheld.

The Dub. & Pacific R. R. Co. v. *Litchfield*, 23 How. 66.
Charles River Bridge v. *Warren Bridge*, 11 Pet. 120.
Leavenworth, etc., R. R. Co. v. *U. S.*, 2 Otto, 733.

IV.

Lands granted to Wisconsin under the act of June 3, 1856 and May 5, 1864, do not *ipso facto* revert to the United States by mere failure to build the road within the period prescribed by the act. The conditions of the grant are conditions subsequent, and no one but the grantor can have any benefit therefrom.

Schulenberg v. *Harriman*, 2 Dillon, 98.

Schulenberg v. *Harriman*, 21 Wallace, 44.

Van Wyck v. *Knevals*, 106 U. S. 360

Knevals v. *Hyde*, 5 Dillon, 469.

I. McCrary, 402.

V.

Whenever a portion of the public lands has been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands and no subsequent law, proclamation or sale would be construed to embrace or operate upon it although no reservation were made of it.

Wilcox v. *Jackson*, 13 Pet. 498.

Leavenworth, etc., R. R. Co. v. *U. S.*, 11 Otto, 745.

Newhall v. *Sanger*, 92 U. S. 762.

Kansas Pacific R. R. Co. v. *Dunmeyer*, 113 U. S. 641.

Glidden v. *Union Pacific R. R. Co.*, 30 Fed. Rep. 661.

U. S. v. *McLaughlin*, 30 Fed. Rep. 148.

VI.

The court will observe that its opinion in the case of *Buttz* v. *the Northern Pacific R. R. Co.*, 119 U. S., page

55, was filed Nov. 15, 1886, and that this action was commenced by the issuance of a summons on the thirteenth day of December following, less than thirty days thereafter. It may be fairly inferred that the respondent misconstrued some of the language of the court used in the opinion in that case.

The principle seems to be settled by the department and the court that if the land was not subject to the withdrawals at the date the withdrawals took effect, it could never become subject thereto, and that lands within the limits of the withdrawal covered by a pre-emption or homestead filing, or otherwise withdrawn from the public domain, or which were excepted from the grant from any cause are excepted from the withdrawal, although within the limits of the land withdrawn and within its general terms. This is a well settled rule.

And in the case of *Butts* v. *The Northern Pacific R. R. Co.*, the court used the following language:

"It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterward prove to be useless."

It seems too clear for argument, that no lands could be withdrawn from pre-emption and sale in excess of the grant, while the grant might extend to a great quantity of lands not within the limits of the withdrawal. This seems to be the doctrine of the supreme court in the case of the *K. P. Ry. Co.* v. *A. T. & S. F. R. R. Co.*, 112 U. S. 422, where the court used the following language:

"The order of withdrawal of lands along the 'probable lines' of the defendant's road, made on the nineteenth of March, 1863, by the

commissioner of the general land office, affected no rights which, without it, would have been acquired to the lands, nor in any respect controlled the subsequent grant."

Wheeler v. *S. J. & D. C. R. R. Co.*, 7 C. L. O. 10.
McCain v. *T. & P. R. R. Co.*, 9 C. L. O. 235.
Theodore Hess, 8 C. L. O. 108.
Albert Fry, 10 C. L. O. 94.
St. P., M. & M. R. R. Co. v. *Sharp*, 11 C. L. O. 58.
O. & C. R. R. Co. v. *N. P. R. R. Co.*, 11 C. L. O. 172.
Texas & P. Ry. Co. v. *Hancock*, 3 L. D. 164.
Tex & Pac. Ry. Co. v. *Gray*, 3 L. D. 253.
H. & D. Ry. Co. v. *Maxwell*.
Olson v. *St. P., M. & M. R. R. Co.*, 2 L. D. 501.
Emmerson v. *C. P. R. R. Co.*, 3 L. D. 117.
St. P., M. & M. R. R. Co. v. *Cowles*, 3 L. D. 226.
N. P. R. R. Co. v. *Burt*, 3 L. D. 491.
S. P. R. R. Co. v. *Larson*, 3 L. D. 305.
S. & N. Ala. R. R. Co. v. *Logan*, 3 L. D. 304.
Swanson v. *S. P. R. R. Co.*, 3 L. D. 285.
Olson v. *Lawrson et al.*, 4 L. D. 405.
St. P., M. & M. R. R. Co. v. *Paulsen*, 4 L. D. 233.
C., R. I. & P. R. R. Co. v. *Easton*, 4 L. D. 265.
Elwell v. *N. P. R. R. Co.*, 5 L. D. 566.
Graham v. *H. & D. Ry. Co.*, 1 L. D. 362.
Ward v. *S. M. Ry. Ext. Co.*, 1 L. D. 387.
Johnson v. *S. P. & S. C. Ry. Co.*, 10 C. L. O. 20.
Eberle v. *St. P. R. R. Co.*, 10 C. L. O. 13.
H. & D. Ry. Co. v. *U. S.*, 11 C. L. O. 172.
C. P. R. R. Co. v. *Wolford*, 3 L. D. 264.
N. P. R. R. Co. v. *De France*, 11 C. L. O. 117.
Baptiste Peone, 11 C. L. O. 286.
John T. Gordon, 12 C. L. O. 301.
N. P. R. R. Co. v. *Mary Burdon*, Exhibit "R."

VII.

The grant to the respondent being *in presenti* and the tract in controversy excluded from the grant both by its terms and by the general principles of the law relating to grants, "it follows that the same was absolutely and unconditionally excepted from the grant; and it makes no difference whether or not the tract subsequently became a part of the public lands of the country."

Leavenworth, Etc., R. R. Co. v. *U. S.*, 11 Otto, 742.

And this would be the same, although the tract of land had been reserved upon a mistaken construction of a prior grant made by the United States.

Walcott v. *Des Moines Navigation Co.*, 5 Wall. 681, 688, 689.

Williams v. *Baker*, 17 Wall. 144.

VIII.

There seems, therefore, to be no principle and no rule of construction pertaining to these grants left for controversy or dispute unless it rests solely upon the precise language used in the grant to the Northern Pacific Railroad Company, and the difference between the language there used and that used in the grants that have been before the supreme court of the United States in the great number of cases that have been decided.

The words of exception to the grant of sections designated by odd numbers were as follows:

"*Not reserved, sold, granted or otherwise appropriated, and free from pre emption or other claims or rights at the time a line of said road is definitely fixed* and a plat thereof filed in the office of the commissioner of the general land office."

It was further provided, that whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; and the further proviso was made, that if said road shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

While it is admitted that the language used in the grant to the Northern Pacific is not the precise formula used in the other acts of Congress granting lands to aid in the construction of internal improvements, it is claimed that the legal effect of the language is precisely the same; that in all cases the odd sections of the public lands of the United States were granted to which the United States had full title, and that were free from homestead, pre-emption settlements, sales and prior grants WHEN THE GRANT WAS MADE, and when the line of route was definitely fixed. None of the lands included within the exceptions fell under the grant any more than if not within the granted limits. The grant did not attach to specific lands until the map of definite location was filed; this was January 5, 1883. (See Stipulation 27, Record.)

To determine the precise limits and extent of the grant by Congress, is the crucial test of all cases like the one at bar.

In the case of *The United States* v. *Burlington & Missouri Railroad Company*, 4 Dillon, 299, Associate Justice Miller uses the following language:

"The grant is one of amount or quantity, and that quantity is to be had subjected alone to these restrictions:

"1. The sections can only be of odd numbers.

"2. They must be limited to ten per mile on each side of the road.

"3. They must be on the line of the road.

"4. They must be of lands not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the road was definitely located."

In the case at bar we say the tract could not have been included in the grant of July 2, 1864, because at that time:

First—It was not land to which the United States had full title.

Second—It had been sold by the United States and the money received in payment therefor was in the treasury.

Third—It was covered by the grant of the United States to the State of Wisconsin in 1856.

Fourth—It was covered by the grant of the United States to the State of Wisconsin in May, 1864.

The rule or rules that may have been adopted or applied by the commissioner of the general land office and the secretary of the interior in the case of private land claims, based upon Spanish or Mexican grants, where there had been no affirmative action of the United States, and are *sub judice* when the grant is made, can have no application to this case or this class

of cases. Here the United States, through its proper officers and departments, had recognized pre-emption claims and other grants, while in the case of private land claims Congress has not excepted them from the grant in terms unless the land has been actually appropriated to the claim by the United States, in which event the private land claim must have been adjudged valid by the department. In one case the acts segregating and appropriating the land are the acts of the United States; in the other case the land is simply claimed by a private citizen, and the claim may be adjudged valid or void, and if found to be void, then the land claimed had never been appropriated, and it would clearly be of that class, which, if in odd sections, would pass by the grant. In one case the land has been segregated from the public domain and appropriated by and under the laws of the United States; in the other the question whether the land shall be segregated and appropriated is under consideration. Such land is not excepted from the grant by its terms, and if excepted at all it must be because the right to have the same segregated and appropriated was fully vested at the time of the grant, and the grant would carry all save rights absolutely vested.

In the case of *Buttz* v. *The Northern Pacific Railroad Company*, 119 U. S. p. 72, the court used the following language:

"When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: It is to preserve the land for the company, to which, in aid of the construction of the road it is *granted*. Although the act does not require the officers of the land department

to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

Nor is there anything inconsistent in this view of the sixth section as to the general route, with the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted or otherwise appropriated and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. *The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption.* The two sections must be so construed as to give effect to both, if that be practicable."

Such construction is practicable. It is plain that the two sections relate to two different classes of the lands granted. The third section relates to lands surveyed before or when the route is fixed within the states or elsewhere, and the sixth to lands unsurveyed at that time in the territories. The provision is that no one shall acquire rights as against the company by settlements upon unsurveyed lands granted within the limits of the grant before the route is fixed, nor during nor after the survey of such lands which must be made after the route is determined upon and the map filed as provided in the act.

The confusion in the mind seems to arise from an assumption that all odd sections within the limits of the grant are granted, when in fact only a *certain class of such odd sections* are granted. Odd sections

"not reserved, sold, granted or otherwise appropriated *at the time that the grant is made*, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed* and a plat thereof filed in the office of the commissioner of the general land office."

No grant has been made to the respondent by Congress except in and by section three of the act of July

2d, 1864; all other legislation relating to the same relates to the manner and form in which the grant shall be determined and the title vested. The rule of this court has been, and is, that without any reservation in terms in the grant that no land will be granted which has been reserved, sold, previously granted or otherwise appropriated. (Authorities above cited.)

And the contention in this case seems to be that the effect of the grant made in and by section three of the act of July 2, 1864, was to grant lands to which the United States might acquire title between the date of the grant and the date of filing the map of definite location of the road. The grant was of

"twenty alternate sections per mile on each side of said railroad line, as said railroad may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state."

Hence the grant would extend over an area twenty miles in width on both sides through a state and forty miles in width on both sides through the territories. It is evident from the language that section six of said act related wholly to the unsurveyed lands lying in the territories, for it directed that the

"president of the United States cause the lands to be surveyed for forty miles in width on both sides of the entire line of said railroad after the general route shall have been fixed and as fast as may be required by the construction of said road; and the odd sections of land *hereby granted* (not the odd sections included within the limits above specified) shall not be liable to sale or pre-emption before or after they are surveyed, except by said company as provided in this act."

So this whole controversy turns upon the extent of the grant of odd sections and parts of sections within the limits specified in the act. The premises in question had been appropriated by the pre-emption settlement, followed by the entry of and payment for the

same by James Robinson Jr. and his heirs. When said pre-emption entry was canceled and the money paid for said land had been refunded to said heirs, the said tract became a part of the public lands of the United States in an odd section that fell within the grants to the State of Wisconsin of 1856 and 1864, both of which are prior to the grant to the respondent, and fell within the withdrawals of 1856, 1864 and 1869.

Hence within the meaning of the act of Congress, the said pre-emption had been granted for the purposes of constructing other railroads prior to the grant to the respondent. This court, in speaking of this grant in the case of *The St. Paul & Pacific Railroad Company* v. *The Northern Pacific Railroad Company*, 139 U. S., page 1, and referring to the act of Congress of March 3, 1865, and the act of March 3, 1871, changing the grants made by the act of March 3, 1857, uses the following language (page 15):

"These two acts are subsequent in date to the act under which the plaintiff claims, *and the rule has long been settled that where differen grants cover the same premises the earlier takes the title.* There would be no reason why that rule should not be followed in the present case if the act of March 3, 1871, should be held to cover the premises in controversy."

IX.

The condition of the premises in controversy that would exclude them from the grants of public lands to the State of Wisconsin in 1856 and 1864, being the same as existed at the date of the grant to the respondent of July 2, 1864, will exclude the premises from that grant; said grants covering the same premises, the earlier grant would take the title if either. The officers of the general land office and interior depart-

ment have held continuously and consistently from the first that the premises did not pass by either of the grants, for the reason that they were not of the class of lands described in the grants. The Portage, Winnebago & Superior Railway Company, and its successor, the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the St. Croix & Superior R. R. Co., and its successors, pursued their claim to the tract in controversy until the local officers decided against it, from which decision said company did not appeal, although its rights were prior in point of time to that of the Northern Pacific. The holding of the commissioner of the general land office, that

> "the above mentioned tract is also within the twenty mile limits of the act of July 2d, 1864, for the benefit of the Northern Pacific R. R Co., but being within the granted limits of the act of 1856, for the benefit of the St. Croix & Lake Superior R. R. Co., I think the tract is therefore excluded from said grant,"

is in strict conformity to law. Land in the odd sections within the limits of the grant, to pass by the terms thereof, must be land "not reserved, sold, granted or otherwise appropriated," at the time the act is passed, and must also be free from pre-emption and other claims and rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, otherwise it must be held that Congress blindly granted that, concerning the value of which it has no knowledge, land covered by townsite claims and of the value of many millions, may, by collusion, be carried under the grant and the rights and property of individuals unintentionally confiscated or taken away. The grant is of lands that are public lands at the time the grant is made, and that are public lands at the time the line of the road is definitely

fixed and a plat thereof filed in the office of the commissioner of the general land office, except as to those in the territories that are unsurveyed when the grant was made, and as to such lands the question, whether or not they are included within the grant, must turn wholly upon their condition at the time the grant is made. Odd sections within the forty mile limits on each side of the line of road in the territories that are free from pre-emption, homestead settlement, grants and other claims at the date of the grant, will pass without any reference to any pre-emption or homestead settlements made after the grants as provided in section six of said act; but upon such lands a pre-emption or homestead settlement or other appropriation before the grant would exclude the same from its operations, and upon such tracts becoming free from said pre-emption or homestead settlements or other claims, they would become a part of the public domain of the United States and fall under the provisions of the general land laws.

X.

It is clear from the legislation of Congress that its settled policy has been to promote the construction of railroads and the settlement of the country at the same time, and everything has been done that the human mind can conceive of to protect the railroad companies in all their legal rights and also to promote settlement and protect the settlers in their legal rights at the same time. Hence indemnity limits have been fixed within which an amount of lands taken, even after the grant, by pre-emption and homestead settlers, equal to that taken may be received by the railroad companies from the

United States. The same purpose is clearly manifested by Congress in the act of the twenty-first day of April, 1876, section three of which is in the following words:

"That all such pre-emption and homestead entries which may have been made by permission of the land department or in pursuance of the laws and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grant shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor."

Vol. 19 U. S. Statutes at Large, pp. 35 and 36.

If the above act is valid, then any pre-emption or homestead settlement made within the limits of the grant to the Northern Pacific Railroad Company after the fourth day of July, 1880, will be made at a time subsequent to the expiration of such grant, and all the benefits of the act of April 21, 1879, will inure to such settler. The settlement of the appellant in this case upon the tract in controversy was made Jan. 25, 1881, with the approval of the local land officers, that of the commissioner of the general land office and that of the secretary of the interior, and was carried to patent. On June 11, 1879, the secretary of the interior decided that the grant to the Northern Pacific Railroad Company by its terms expired on July 4, 1880. (See report of the commissioner of the general land office, 1879, page 109.)

Hence if any benefits are conferred upon settlers by the act of April 21, 1876, the date of the passage of the act, such benefits are conferred upon the appellant. There is no longer any question as to the right and power of Congress to further legislate in connection with any portion of the public lands that have been included in a grant before made by Congress, which, by its terms and conditions, has expired. The rule of this

court is, that until this right and power is exercised the grant remains inviolate. The effect of the conditions attached to the grant to the respondent was at a certain time to permit Congress to divest vested rights and subject the lands granted to any such additional conditions or modifications or forfeitures as Congress might determine to be wisest and best upon grounds of public policy, for promoting the general welfare in the highest degree, by completing the road. The effect of the act of Congress of April 21, 1876, was to subject any lands which had theretofore been granted for aiding in the construction of railroads after the expiration of the time limited for the construction of such roads, to pre-emption and homestead settlement and entry in the same manner as if no grant had been made. This was the exercise of a power by Congress, fully vested in it, which interfered with no rights that were vested which were beyond its power to divest, and gave to the appellant in this case, and to all settlers of her class, an absolute right to enter upon any portion of the public lands lying within the grant of the Northern Pacific Railroad Company, or of any other railroad company, which had not earned its lands within the time prescribed by Congress, and make a settlement upon the same, and improve and enter the same in the same manner and to the same extent as if said lands were not within the limits of any previous grant.

To sustain the decree and judgment of the court below this court must sustain the following propositions:

First—That notwithstanding the tract in controversy was subject to a pre-emption claim and settlement and had been sold and the consideration therefor

paid into the treasury of the United States on July 2, 1864, when the grant to the respondent was made, and notwithstanding the same was at that time covered by and was within the limits of lands granted in place in two previous grants made by Congress, still, if on the fifteenth day of September, A. D. 1870, when the respondent duly made out a map or diagram showing the general route of all that part of the line of railroad authorized to be constructed by it in the State of Wisconsin, the said pre-emption settlement and sale had been canceled by the United States, and the said tract was then free from any pre-emption claim, then the same was included in the grant to the respondent, although the prior grants to Wisconsin covered the same and still remained in force, and were never modified or changed except by the commissioner of the general land office fixing a new western terminal line for said grants, after the date of the pre-emption settlement of appellant.

Second—The court must hold that the making out of a map or diagram, showing the general route of the railroad and filing the same with the commissioner of the general land office, has the same effect in law as the definite location of the line of road on the ground, and filing a map of such definite location of said road with the commissioner of the general land office.

Third—It must hold that the action of the commissioner of the general land office fixing the western terminus of the grant at St. Louis river is not of the same force and effect, so far as the rights of third parties are affected, as the action of the commissioner of the same office fixing it at a line drawn north and

south through the mouth of the Nemagi river, and that the "west end" of Superior is at the mouth of the Nemagi river instead of Duluth and the St. Louis river.

The facts in this case are undisputed, and the commissioner of the general land office and secretary of the interior have decided in accordance with the rules of decision of the supreme court and the law of the land, that the title of the premises in controversy, vested in the appellant by the patent, was rightfully vested in her, and the respondent has no right, title or interest in and to the same. The judgment and decree of the court below should be reversed and the bill should be dismissed.

JOHN B. SANBORN,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

MARY BARDON, Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY.

No. 343.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF OF APPELLEE.

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Press of McGILL & WALLACE, Washington, D. C.

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BRIEF OF APPELLEE.

Statement of Facts.

This action was brought by appellee to have all the right, title, and interest acquired by the appellant in and to the northeast quarter (N. E. ¼) of section 33, in township 49 north, of range 14 west, under and by virtue of a patent from the United States issued January 19, 1887, to the appellant, decreed to have been acquired and to be held by appellant in trust for the use and benefit of the appellee. The appellee bases its right upon an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast, by the northern route," approved July 2, 1864. The facts have been stipulated, and are briefly as follows:

Prior to September 12, 1855, the land had been surveyed, and was at that date public land subject to preemption or other disposal. [Stip., sec. 1, Rec., 32 (90).]

September 12, 1855, James S. Robinson, Jr., a duly qualified pre-emptor, settled upon this land; and September 21, 1855, filed his pre-emption D. S. therefor. [Stip., secs. 2 and 3, Rec., 32 (91).]

Afterwards Robinson died and his heirs made final proof July 30, 1857, and paid for the land. They continued to reside on the land until some time prior to July 2, 1864, but at that date they had abandoned the land. August 5, 1865, the entry was canceled for failure to furnish proof of continuous residence prior to July 30, 1857, and the money theretofore paid to the United States by the heirs on making final proof was refunded by the Government and accepted by the heirs. [Stip., secs. 4, 5, 6, and 7, Rec., 32–3 (91–2).]

June 3, 1856, Congress passed an act granting to the State of Wisconsin, to aid in the construction of a railroad from Madison or Columbus via Portage City to the St. Croix river or lake, and thence to the west end of Lake Superior, every alternate section of land for six sections in width on each side of said railroad, with the usual reservations and provisions for indemnity. May 29, 1856, the Secretary of the Interior, in anticipation of the approval of the act, which had then passed Congress, withdrew the lands along the probable line of the railroad, and this tract was within the limits of this withdrawal. [Stip., secs. 10 and 11, Rec., 33–4 (93).]

November 5, 1857, the St. Croix and Lake Superior Railroad Company, now the Chicago, St. Paul, Minneapolis and Omaha Railway Company, upon whom the State had conferred that portion of the grant extending from the St. Croix lake or river to the west end of Lake Superior, filed a diagram of the definite location of its route with the Secretary of the Interior; and this land

fell within the six-mile place limits of the grant as determined by the definite location. [Stip., secs. 8, 9, and 11, Rec., 33–4 (93).]

November 8, 1862, the Commissioner of the General Land Office forwarded to the local officers of the land office at Bayfield, within which land district this land was situate, a diagram showing the line of definite location of the St. Croix and Lake Superior road, with the six and fifteen-mile limits of the land grant designated thereon. [Stip., sec. 12, Rec., 34 (94).]

By an act approved May 5, 1864, Congress granted to the State of Wisconsin, upon the same terms and conditions as the grant of June 3, 1856, every alternate section of land for ten sections in width on each side of a line from the St. Croix river or lake to the west end of Lake Superior; and also for a line from Bayfield to Superior on Lake Superior, with the usual reservations and provisions for indemnity. The grant for the first of these lines was bestowed, like the grant of 1856, upon the St. Croix and Lake Superior Railroad Company, which, by a resolution of its board of directors, April 22, 1865, adopted its line of definite route as located under the grant of 1856, as its line under the grant of 1864; and in 1866 a diagram of this line, with the place and indemnity limits under the grant marked thereon, was sent by the Commissioner of the General Land Office to the local land office at Bayfield. [Stip., secs. 15, 16, 17, and 18, Rec., 34–5 (94–5–6).]

The grant for the line from Bayfield to Superior was bestowed by the State upon certain corporations afterwards consolidated and known as the Portage, Winnebago and Superior Railroad Company. This company filed a diagram of its definite route with the Secretary of the Interior September 7, 1869; and December 10, 1869, the Commissioner of the General Land Office sent to the register and receiver of the land office at Bayfield a copy

of this diagram with the lateral place and indemnity limits of the grant designated thereon, and ordered the withdrawal from sale, location, pre-emption or homestead entry of all the odd-numbered sections falling within those limits. [Stip., secs. 19, 20, 21, Rec., 35 (96).]

Whether this order fixed a terminal limit to the withdrawal is a disputed question. It is admitted, however, that in 1883 a terminal limit to the withdrawal *was* fixed, and that, according to this terminal limit, the land in question fell without the limits of the withdrawal. [Stip., secs. 23, 24, and 25, Rec., 35–6 (97).]

The name of the Portage, Winnebago and Superior Railroad Company was, February 4, 1871, duly changed by the Legislature of the State of Wisconsin to "The Wisconsin Central Railroad Company." [Stip., sec. 22, Rec., 35 (96).]

August 13, 1870, appellee filed a map of its general route opposite this land in the office of the Commissioner of the General Land Office, and September 15, 1870, the commissioner, having accepted the same, transmitted to the local land office at Bayfield a copy of this diagram, and ordered the withdrawal from sale, location, pre-emption, or homestead entry all the odd-numbered sections of public land falling within the limits of twenty miles of and on the line, as indicated on the map of general route. [Bill, Rec., 16, 17 (59, 60, 61); answer, Rec., 24, (75–6); stip., sec. 26, Rec., 36 (96).]

December 2, 1871, Owen Sheridan made homestead entry of the land, and this entry was canceled in 1880. [Stip., sec. 28, Rec., 36 (98).]

It is agreed that from before the date of the grant to the Northern Pacific Railroad Company, and until the entry of Owen Sheridan, subsequent to the time when the Northern Pacific Railroad Company fixed the line of its general route, there was no person residing upon the land or claiming residence thereon. It is also agreed

that no person had any interest therein subsequent to August 5, 1865, when the entry of Robinson was canceled, until December 2, 1871, except such interest, if any, as the St. Croix and Lake Superior Railroad Company, the Portage, Winnebago and Superior Railroad Company, and this appellee acquired, by reason of the acts of Congress, of the Legislature of Wisconsin, the acts of the officers of the Interior Department and Land Office, and of such railroad companies or either of them appearing in the stipulation and the pleadings in this cause. [Stip., sec. 7, Rec., 33 (92).]

January 25, 1881, the appellant settled upon the land, and February 14, 1881, filed declaratory statement No. 654 therefor. June 8, 1882, the appellant having published notice of her intention to make final proof, proved up on the land and received the receiver's receipt. [Stip., secs. 29 and 30, Rec., 36–7 (99).]

July 6, 1882, the Northern Pacific Railroad Company, having duly fixed the line of definite location of its road, filed a plat thereof in the office of the Commissioner of the General Land Office. [Bill, Rec., 17 (61), and admission in answer; answer, Rec., 24 (75–6).]

At the date of making final proof by the appellant the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the successor to the St. Croix and Lake Superior Railroad Company, appeared and contested the claim of the appellant on the ground that the land was included within its grant. The appellee had no actual notice of the making of final proof by appellant, and did not appear at the hearing; but subsequently, learning of the case, appeared and appealed to the Commissioner of the General Land Office, who, after a hearing, decided in favor of the appellant herein. The appellee then appealed to the Secretary of the Interior, who decided that inasmuch as the appellee had not appeared at the hearing before the register and receiver, it could not afterwards

contest the claim of appellant. [Stip., secs. 31, 32, 33, 34, and 35; Rec., 37–8 (99, 100–1); Exhibit R, Rec., 51 (124–5), and Exhibit T, Rec., 52–3 (127–8).]

January 19, 1887, the United States issued a patent to appellant for the land. [Stip., sec. 36, Rec., 38 (101).]

The appellee had duly completed the line of its road opposite the land, and the same was accepted by the president September 18, 1882. [Bill, Rec., 17 (61–2); answer, Rec., 24 (75–6).]

It is further agreed that the appellee has fully complied with all the terms, provisions, and conditions of the act of July 2, 1864, and the acts and resolutions amendatory thereof and supplementary thereto, except as appears in the bill and answer; that said land lies within the place limits of the grant to said railroad company, and passes to said company by reason of said acts and resolutions and the compliance therewith as aforesaid, unless excepted from said grant by reason of the facts set forth in the pleadings and stipulations in the cause. [Stip., sec. 41, Rec., 48 (102).]

Upon these facts the following questions arise:

First. Is the land in question excepted from the grant to appellee by reason of the uncanceled entry and final proof of James Robinson and his heirs existing upon the records at the date of the grant?

Second. Is the land excepted from the grant to the appellee by reason of falling within the limits of the grant of 1856 to the St. Croix and Lake Superior Railroad and the withdrawals thereunder?

Third. Is the land excepted from the grant to the appellee by reason of falling within the limits of the grant of May 5, 1864, to the St. Croix road?

Fourth. Is the land excepted from the grant to the appellee by the withdrawal of December 10, 1869, for the Portage, Winnebago and Superior Railroad Company?

Fifth. Was the land free from pre-emption or other claims or rights at the date appellee filed its map of definite location in the office of the Commissioner of the General Land Office?

Sixth. Is appellee now estopped from contesting the claim of appellant by reason of its failure to appear before the local land officers at the date of final proof?

Seventh. Is appellant's entry, if otherwise the land inures to appellee, cured by the act of April 21, 1876?

It is conceded, if these propositions are decided in appellee's favor, it is entitled to the relief prayed for in its bill of complaint.

ARGUMENT.

I.

The point of time when the status of the title determines whether lands pass under the grant, as fixed by the act of July 2, 1864, is when the line of the road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and the fact that the land in controversy was covered by an entry at the date of the granting act is immaterial.

The material portion of the act of July 2, 1864, granting lands to appellee, is as follows:

"SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten

alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act."

Although this act makes a grant *in præsenti*, the lands granted are not specifically described; and until they are identified in the manner described in the act the grant remains afloat; that is, it vests in the grantee a present title to the quantity of land granted, but that title does not attach to the specific tracts until they are defined, when it attaches as of the date of the grant, for the purpose of cutting off all intervening claims or rights other than those expressly excepted. The power of Congress to make such a grant, which will operate to convey lands that are the property of the United States at the time the lands are identified, although not public lands at the date of the grant, will not, we think, be contro-

verted; and the only question is, whether by the act of July 2, 1864, an intention so to do is shown. The answer to this question must be found in the terms of the act itself. In construing the act it should be borne in mind that it is a law as well as a conveyance, and such effect must be given it as will carry out the intent of Congress. That intent must not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. The rules of the common law must yield to the legislative will.

M. K. & T. R. R. Co. *v.* K. P. Ry. Co., 97 U. S., 491;
Winona, etc., R. R. Co. *v.* Barney, 113 U. S., 618.

The rule of construction applicable to legislative grants is well settled. They are be construed strictly. Any ambiguity in the terms of the grant should be resolved against the grantee and in favor of the public. But this rule does not authorize the creation of ambiguities by a strained construction or process of refined, artificial reasoning for the purpose of resolving such ambiguities against the grantee. When the intention of the Legislature is rendered reasonably clear by the application of the ordinary rules of construction there is no room for the rule of strict construction. The position that land to pass by the grant must be free from adverse claims or rights at the date of the grant finds no support in the language of the act. The limitation with respect to the status of the title is, in terms, that the lands must be public lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.*" To make these conditions apply to the status of the title at the date of the grant also, as appellant seeks

to do, is to import into the act a new limitation—one not placed there by Congress. This construction requires the interpolation after the words "claims or rights" and before the words "at the time" of "at the date hereof and." (Appellant's brief, p. 28.)

No authority for making such interpolation is given, and none can be found. In Newhall *v.* Sanger (92 U. S., 761), the court held that a word could not be imported into an act where such interpolation would have operated to enlarge a grant, and, equally, words can not be imported into the grant for the purpose of diminishing it.

U. S. *v.* B. & M. R. R. Co., 98 U. S., 334.

"As to the intent of Congress in the grant to the plaintiff there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route without reservation of rights, *except such as were specifically mentioned.*"

M. K. & T. R. R. Co. *v.* K. P. Ry. Co., 97 U. S., 497.

On page 31 of his brief counsel for appellant suggests a second interpretation of appellee's granting act, making it read:

"* * * Odd sections not reserved, sold, granted, or otherwise appropriated *at the time that the grant is made*, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office."

No reason for interpolating these words and making the exceptions by reason of reservations, sales, grants, and other appropriations depend upon the status of the title at one time, and the exceptions by reason of the attachment of pre-emption or other claims or rights depend upon the status at a totally different time are assigned. It is obvious that such an interpretation is not tenable. All of the terms descriptive of the status of the title refer

to that status at one and the same period, to wit, "when the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

The sole foundation of appellant's claim necessarily rests on the proposition that the grant is *in præsenti*, and that Congress must not be considered as granting the title to what it did not own or have full title to at the date of the grant. This proposition, we have seen, finds no support in the language of the act, and an examination further shows that it has no support in the congressional policy evidenced by the act. It must be remembered that this act is a law as well as a conveyance, and must receive such a construction as will carry out the intention of Congress, however difficult it might be to give full effect to the language used if the grant was by instruments of private conveyance. To ascertain that intent we must look at the condition of the country at the time the act was passed, as well as the avowed policy of the act as declared on its face. (*United States* v. *U. P. R. R. Co.*, *91 U. S.*, *72*.) The act made a grant through a country the greater portion of which was wild and unsettled. The lands granted were to be on each side of the line of definite location, and until that line was fixed it was impossible to tell where they would fall. It was obvious that many entries of land that would fall within the limits of the grant, as finally determined, would be made by settlers between the date of the grant and the final location of the road and consequent identification of the grant. The Government would find it necessary to erect forts and set apart Indian and military reservations. The opening up and settlement of the country was earnestly desired, and this railroad was one of the great agents to bring about that result. But it was equally obvious that if this vast floating grant, when located, was to take pre-

cedence over all conflicting claims and rights initiated since July 2, 1864, it would retard and prevent settlement and development. It might crush out Indian reservations and render the military trespassers in their own barracks. No settler would go upon lands and establish a home which after years of occupation, the location of the grant would show to be upon the property of the railroad company. To avoid these evils, and to enable the course of encouraging settlement and development by means of sales, the pre-emption and other land laws to proceed without conflict, and side by side, with the course of encouraging such settlement and development by assisting in the construction of railroads, the exceptions were inserted in section 3 of the act of July 2, 1864. By those exceptions all pre-emption or other claims or rights initiated by settlers, and all reservations, appropriations, etc., by the Government, initiated and made upon lands prior to the time when it could be known that such lands would fall within the limits of the grant, are protected. The purpose of these exceptions was not to limit the grant, but to protect rights vested and existing in others. It was to prevent these great corporations acquiring an interest in the lands to which there were existing claims and rights in favor of others, and thus enabling them to appear in the hostile attitude of contestants.

Ryan *v.* C. P. R. R. Co., 5 Saw., 264;
Emslie *v.* Young, 24 Kas., 741;
Young *v.* Goss (Kas.), 22 Pac., 572;
K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640.

To extend those exceptions beyond this, their manifest purpose, could serve no end. To exclude a tract of land from the grant, which was free at the date of definite location, because a claim or right had attached thereto at the date of the grant, would be a useless proceeding,

and, in the absence of express words, we can not think such was the intention of Congress. The grant to the Northern Pacific is a grant of quantity, if that quantity exists in the place and indemnity limits.

N. P. R. R. Co. *v.* Barnes (N. D.), 51 N. W.;
N. P. R. R. Co. *v.* Amacker (Cir. Ct. App.), 48 Fed. R.;
St. P. & P. R. R. Co. *v.* N. P. R. R. Co., 139 U. S., 1;
U. S. *v.* B. & M. R. Co., 98 U. S., 334.

The exclusion of a tract of land from the grant by reason of any of the exceptions, does not diminish the quantity granted, but merely operates to change the situation of the specific tract from the place to the indemnity limits. And the United States can have no object, in withholding a tract from the grantee within the place limits of the grant, and substituting therefor a tract of equal area within the indemnity limits, each being alike public lands at the date of definite location of the road. Indeed, if the question of policy be considered, the policy of the Government would seem to require the company to satisfy its grant out of the lands nearest the line.

Wood *v.* B. & M. R. R. Co., 104 U. S., 329.

Our conclusion, that it is the status of the title at the date of definite location, and not at the date of the grant, that determines whether the land is granted, is fully sustained by the authorities.

March 14, 1883, Secretary Teller held, after discussion, that by the terms of the Pacific Railroad grants, 12 Stat., 489, which, in this respect, is like the Northern Pacific act, lands, *sub judice* at the date of the grant, passed by the act if public at the date of filing the map of definite location.

C. P. R. R. Co., 2 L. D. 479.

August 14, 1886, Acting Secretary Muldrow, in an elaborate opinion, expressed the same views.

Rees *v.* C. P. R. R. Co., 5 L. D. 76–7–8–9.

And on a motion for review, Mr. Justice Lamar (then Secretary of the Interior) sustained the Acting Secretary.

Id., 5 L. D., 279.

And this is now the settled law of the Interior Department.

Putnam *v.* H. & D. R. R. Co., 13 C. L. O., 150;
Centner *v.* N. P. R. R. Co., 5 L. D., 311;
N. P. R. R. Co. *v.* Clark, 5 L. D., 140;
Perkins *v.* C. P. R. R. Co., 5 L. D., 155;
Cayce *v.* St. L. I. M. R. R. Co., 6 L. D., 356;
H. & D. R. R. Co. *v.* McClintock, 7 L. D., 207;
Blair *v.* H. & D. R. R. Co., 7 L. D., 241;
Showell *v.* C. P. R. R. Co., 10 L. D., 167.

The decisions of the courts are to the same effect.

U. S. *v.* McLaughlin, 30 Fed. R., 148, 162;
Ryan *v.* C. P. R. R. Co., 99 U. S., 388;
Denny *v.* Dodson, 32 Fed. R., 899;
S. P. R. R. Co. *v.* Orton, 32 Fed. R., 469–79;
S. P. R. R. Co. *v.* Dull, 22 Fed. R., 494;
U. S. *v.* B. & M. R. R. Co., 98 U. S., 339.

We submit, that since the entry of Robinson and his heirs was cancelled, and the purchase price of the land returned to and accepted by his heirs long before the date of filing its map of definite location by the appellee, that entry did not operate to prevent the land in controversy passing under the grant to appellee.

II.

The fact that the land in controversy fell within the limits of the grant of lands to aid in the construction of certain railroads, made by the act of Congress approved June 3, 1856, is not sufficient to exclude it from the grant to the Northern Pacific, it being excepted from the earlier grants and the withdrawals thereunder.

By an act entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," approved June 3, 1856, Congress provided:

"That there be, and is hereby, granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City to the St. Croix river or lake between townships 25 and 31, and from thence to the west end of Lake Superior; and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid), shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*,

That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case and selected for and on account of said roads. * * * *And provided further*, That any and all lands reserved to the United States by an act of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States." (11 Stat., 20.)

This grant was duly accepted by the State of Wisconsin; and thereafter, by acts approved October 11, 1856 (Chap. 122, P. & L. Laws of Wisconsin, 1856), and March 6, 1857 (Chap. 290, P. & L. Laws of Wisconsin, 1857), the State transferred to the St. Croix and Lake Superior Railroad Company that portion of the grant appertaining to a line of railroad from Lake St. Croix to Lake Superior. [Answer, Rec., 26, (78, 79); stip., sec. 8, Rec., 33 (92).]

This grant was duly accepted by the company named.

May 29, 1856, the Secretary of the Interior, in anticipation of the approval of the act of June 3, 1856, fixed the western limit of the grant at the easterly bank of the St. Louis River, as the same runs south from the west end of Lake Superior, and withdrew all the odd-numbered sections of public land from sale east of said bank of said river, and advanced the price of all the even-numbered sections within said limits, including the even, numbered sections contiguous to and near the said tract since patented to said appellant, to $2.50 per acre, and the land in question fell within the limits of this withdrawal. [Stip., secs. 10 and 11., Rec., 33–4 (93).]

At the time this order of withdrawal was made and when it was received at the local land office, the land in

controversy was occupied by James Robinson, Jr., who had settled thereon September 12, 1855, and filed a pre-emption declaratory statement therefor September 21, 1855; and with his heirs, continued to occupy such land until prior to July 2, 1864. [Stip., secs. 2, 3, 4, 5, 6, and 7, Rec., 32–3 (91–2).]

The exact date of the abandonment of said land by said heirs is unknown. It merely appears they had abandoned it prior to July 2, 1864. Possession or residence once proved to exist is presumed to continue until the contrary is shown.

Laws. Pres. Ev., pp. 163, 172, and cases cited.

And in the absence of evidence to the contrary this presumption is conclusive.

The land by reason of this pre-emption entry and occupation was excepted from the withdrawal. The withdrawal included public lands only. Lands which at the date of the withdrawal were covered by a pre-emption claim or entry, were not public lands and would not be included within a proclamation in general terms, although not expressly excepted therefrom.

Wilcox *v.* Jackson, 13 Peters, 498;
Leavenworth, etc., R. R. Co. *v.* U. S., 92 U. S., 745;
Newhall *v.* Sanger, 92 U. S., 762;
Kas. Pac. Ry. Co. *v.* Dunmeyer, 24 Kas., 725; s. c. 113 U. S., 641;
Glidden *v.* U. P. Ry. Co., 30 Fed. R., 661.

And it is the settled law of the Interior Department that an executive order of withdrawal will not include lands that were not public at the date of such withdrawal.

Prest *v.* N. P. R. R. Co., 2 L. D., 507;
Shultz *v.* M. K. & T. R. R. Co., 11 C. L. O., 315;
Wheeler *v.* S. J. & D. C. R. R. Co., 7 C. L. O., 10;

McCain *v.* T. & P. R. R. Co., 9 C. L. O., 235;
Theodore Hess, 8 C. L. O., 108;
Albery Fry, 10 C. L. O., 94;
St. P. M. & M. Ry. Co. *v.* Sharp, 11 C. L. O., 58;
O. & C. R. R. Co. *v.* N. P. R. R. Co., 11 C. L. O., 172;
Texas & P. Ry. Co. *v.* Hancock, 3 L. D., 164;
Texas & Pac. Ry. Co. *v.* Gray, 3 L. D., 253;
Olson *v.* St. P. M. & M. Ry. Co., 2 L. D., 501;
Emmerson *v.* C. P. R. R. Co., 3 L. D., 117;
St. P. M. & M. Ry. Co. *v.* Cowles, 3 L. D., 226;
N. P. R. R. Co. *v.* Burt, 3 L. D., 491;
S. P. R. R. Co. *v.* Larson, 3 L. D., 305;
S. & N. Ala. R. R. Co. *v.* Logan, 3 L. D., 304;
Swanson *v.* S. P. R. R. Co., 3 L. D., 285;
Olson *v.* Lawson *et al.*, 4 L. D., 405;
St. P. M. & M. Ry. Co. *v.* Paulsen, 4 L. D., 233;
C. R. I. & P. R. R. Co. *v.* Easton, 4 L. D., 265;
Elwell *v.* N. P. R. R. Co., 5 L. D., 566;
Graham *v.* H. & D. Ry. Co., 1 L. D., 362;
Ward *v.* S. M. Ry. Co. Ext. Co., 1 L. D., 387;
Johnson *v.* S. P. & S. C. Ry. Co., 10 C. L. O., 20;
Eberle *v.* St. P. R. R. Co., 10 C. L. O., 13;
H. & D. Ry. Co. *v.* U. S., 11 C. L. O., 172;
C. P. R. R. Co. *v.* Wolford, 3 L. D., 264;
N. P. R. R. Co. *v.* DeFrance, 11 C. L. O., 117;
Baptiste Peone, 11 C. L. O., 286;
John T. Gordon, 12 C. L. O., 301;
N. P. R. R. Co. *v.* Mary Bardon, Exhibit "R."

This construction by the department of its own orders is binding upon the courts. The order of withdrawal of May 12, 1856, consequently did not affect the land in controversy.

November 5, 1857, the St. Croix and Lake Superior Railroad Company, having definitely located the line of its road, fixed it by filing a map thereof with the Secre-

tary of the Interior, and the tract in controversy was ascertained to be within the six miles or place limits of the grant. Such corporation and its successors in interest have since that time fully constructed and equipped the road to the mouth of the Nemagi River, and the same has been duly accepted by the Department of the Interior and the United States [Answer, Rec., 26 (79); stip., sec. 9, Rec., 33 (93).]

It is well settled that under a grant like that made by the act of June 3, 1856, lands must be public lands at the date when the line of the road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office to pass by the grant. If at that date they are covered by entry the lands are excluded from the grant and indemnity in lieu thereof is given.

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640;
H. & D. Ry. Co. *v.* Whitney, 132 U. S., 357;
Winona & St. P. R. Co. *v.* Barney, 113 U. S., 625;
Sioux City Land Co. *v.* Griffey, 143 U. S., 41.

And, as it appears by the Record, the land in controversy was duly entered by Robinson and his heirs, under the pre-emption laws, July 30, 1857; said entry continuing in force and effect until August 5, 1865. [Stip., sec. 5; Rec., 32 (91).] It follows that the land in controversy was excluded from the grant to the St. Croix and Lake Superior Railroad Company, and that company could thereafter acquire no right thereto under the grant of June 3, 1856.

November 8, 1862, the commissioner transmitted a diagram of the definitely located line of the St. Croix and Lake Superior Railroad to the register and receiver at Bayfield. So much of the letter accompanying the diagram as is material is as follows:

"I inclose herewith for your guidance in disposing of the public lands along the lines of the railroads in your

district, a correct diagram of the main line of the St. Croix and Lake Superior roads.

"The State of Wisconsin acquired under act of June 3, 1856, the right to the odd or granted sections within the six-mile limits to aid in constructing said roads from and after the dates of survey as marked along the line of said roads on said diagram; and the even-numbered sections within said limits were increased in price to $2.50 per acre from the same dates, respectively. * * *"

Stip., secs. 12–13, Rec., 34 (94); Exhibit "C," Rec., 40 (105).

This letter did not order the withdrawal of any lands. It was in no sense an order of withdrawal; and it in no wise affected the land in question. By the definite location of the line of the road the sections granted had become identified, the right of the company had attached to the specific lands, and from that time forth no man could acquire a valid right thereto, save through the company. The letter and diagram (Exhibits "C" and "D") were but the exercise of a wise precaution in giving information to those seeking to make settlements, pre-emptions, and homestead locations, so that they might not ignorantly settle upon these lands in which they could acquire no rights, and in giving the local land officers proper information to guide them in disposing of the even sections, which, by the terms of the act, were increased to double minimum price. This was all they purported to be; and this was all they were. They had no legal effect whatever. But even if we admit that this letter constitutes a withdrawal, yet it would not affect the land in controversy. The land was still covered by the pre-emption entry of James Robinson, and occupied by his heirs; and this would, as we have seen, except it from the operation of the withdrawal, although included in the general language thereof.

The land in controversy being excluded from the

grant of 1856, and the withdrawals thereunder, was not excluded from the grant to appellee merely because it fell within the limits of the former grant. The act of July 2, 1864, specifically prescribes the conditions which must be fulfilled by each tract in order to pass under the grant. (1) They must be embraced within odd-numbered sections; (2) they must be non-mineral; (3) they must be limited to twenty sections per mile on each side of the line in the Territories, and ten sections per mile on each side in the States; (4) they must be on the line of the road; and (5) they must not be reserved, sold, granted, or otherwise appropriated, and must be free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. Lands fulfilling these conditions are granted, and unless the mere fact of falling within the limits of the prior grant takes the tract out of these conditions, it will not operate to exclude them from the grant to the Northern Pacific. It is very clear that that fact can have no such effect. The existence of the earlier grant can not affect the title to lands excepted from its operation. They remain unappropriated public lands open to appropriation by the first claimant under the public land laws.

C. P. R. R. Co. *v.* Shepherd, 9 L. D., 213;
N. P. R. R. Co. *v.* Johnson, 7 L. D., 357.

And being thus public lands in the fullest sense of the term, they will pass by virtue of a subsequent grant of such lands if within the limits thereof; and it is now the settled doctrine of the Interior Department that lands within the limits of an earlier railroad grant will, if excepted therefrom, pass under a later similar grant, if otherwise within its terms.

Harden *v.* C. P. R. R. Co., 4 L. D., 484;
Allers *v.* N. P. R. R. Co., 9 L. D., 452;

N. P. R. R. Co. *v.* Halvorsen, 10 L. D., 15;
N. P. R. R. Co. *v.* Moling, 11 L. D., 138;
N. P. R. R. Co. *v.* Bass, 13 L. D., 201.

This exact point has never, as far as we are able to ascertain, been passed upon by the courts, except in this case in the Circuit Court, where our contention was necessarily upheld, but is fully covered by the principles laid down in—

K. P. Ry. Co. *v.* Dunmeyer, 113, U. S., 640;
U. S. *v.* B. & M. R. R. Co., 4 Dill., 299; s. c. 98 U. S., 339;
Ryan *v.* C. P. R. R. Co., 5 Saw., 264;
S. P. R. R. Co. *v.* Dull, 22 Fed. R., 494;
Wood *v.* B. & M. R. R. Co., 104 U. S., 331.

It was suggested in the court below that this tract would be excluded from appellee's grant by the first provision of section 3 of the act of July 2, 1864, viz.:

"*Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

To bring lands within this exception it is necessary that the route of the road to aid in the construction of which they are granted must be "upon the same general line" as the route of appellee's road. "Route," says Webster, is "the course or way which is traveled or passed, or to be passed; a passing, a course, a march." "Upon the same general line" is upon the same general course or direction.

U. S. *v.* B. & M. R. R. Co., 98 U. S., 339;
G. T. R. R. Co. *v.* Richardson *et al.*, 91 U. S., 461.

And the requirement that the two routes must be "upon the same general line" clearly means that the two routes, or courses, must practically coincide for a reasonable distance; they must so coincide as to cause the land grants to overlap, and the lateral land-grant limits of the one to practically parallel the lateral land-grant limits of the other for such reasonable distance; and where the routes merely cross each other at practically right angles, as does the route of the appellee and that of the St. Croix road, they are not upon the same general line [Exhibit "B," stip., sec. 12, Rec., 34 (94)], and the proviso is not applicable.

U. S. *v.* S. P. R. R. Co., 5 Fed. R., 598.

But if the routes of the St. Croix and of appellee's roads were "upon the same general line" this land would not fall within the proviso. The proviso says: "The amount of land heretofore granted shall be deducted from the amount granted by this act." The grant to the St. Croix road is of ten sections per mile. The amount granted to appellee is twenty sections per mile. Appellee would, ther fore, still be entitled to ten sections per mile for that portion of its road which was upon the same general line as the St. Croix road, even if the St. Croix road received its full grant. The deduction was not to be of all lands within the place limits of the St. Croix grant, nor of all lands within specified boundaries, but of the amount of lands granted to that road. In other words, all lands to which the St. Croix road had acquired title were to be deducted, so far as there was an overlap, from the grant to the Northern Pacific. These lands would have been excluded from appellee's grant without the proviso, but appellee would have been entitled to indemnity therefor. The effect of the proviso is not to change the description of the lands to be deducted from the later grant, but to reduce the grant by the

amount of such land by forbidding the taking of indemnity therefor.

W. & St. P. R. R. Co. *v.* Barney, 113 U. S., 628;
Barney *v.* W. & St. P. R. R. Co., 117 U. S., 229;
C., St. P., M. & O. Ry. Co., 6 L. D., 216.

And this tract, having been excepted from the St. Croix grant, does not come within the proviso.

III.

The land in controversy was excepted from the grant made by the first section of the act approved May 5, 1864, and the withdrawals thereunder, and, consequently, such grant and withdrawals did not operate to exclude it from the Northern Pacific grant.

The first section of the act of Congress of May 5, 1864, granting lands to the State of Wisconsin, provided:

"That there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of June 3, 1856, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin to aid in the construction of railroads in said State, approved June 3, 1856. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said company, to select, subject to the approval of the Secretary of the In-

terior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid. * * * *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the grant of June 3, 1856, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June 3, 1856, should any such deficiency exist."

"Section 6. *And be it further enacted*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

13 U. S. Stat., 66.

1. It is obvious that this act was intended to be supplementary to that of 1856. The act of 1856 had provided for a continuous line. But by various acts of the Legislature of Wisconsin the grant had been subdivided and granted to different companies. The act of 1864 recognizes the subdivisions and the new grant was according. But the act of 1856 is expressly recognized and the rights acquired thereunder are preserved. All lands granted by the act of June 3, 1856, are to be deducted from the ten sections given by the act of May 5, 1864; and no indemnity is given in lieu thereof.

A serious question is presented as to what lands are meant by the phrase "deducting any and all lands that may have been granted to the State of Wisconsin for the

same purpose by the act of June 3, 1856." Are only those lands the title to which vested under the grant of 1856 to be deducted, or are all lands within the limits of the grant of 1856, whether excepted therefrom by reason of prior entries or not, the lands to be deducted from the grant of May 5, 1864? We think the latter. We think the language "all lands that may have been granted to the State of Wisconsin for the same purpose by the act of June 3, 1856," has the same meaning and has reference to the same lands as the language of the indemnity clause of the act of June 3, 1856, viz.: But in case it shall appear that the United States have disposed of any sections "granted as aforesaid;" that is, all lands within the six-mile limits provided for by the act of 1856. We think this is made clear by the provisions of the act of May 5, 1864, "nor shall such selection or location be made in lieu of lands received under the grant of June 3, 1856, but such selection and location may be made * * * to supply any deficiency under the said grant of June 3, 1856;" that is, the company may resort to the indemnity lands, under the act of 1864, to supply losses in the place lands of the act of 1856.

The section of land in controversy having been lost from the grant of 1856, the company was entitled to select indemnity therefor in the indemnity limits of the grant of 1864. If, then, the grant of 1864 also passed title to the land, the result would be that the company would have the land (if it were not otherwise excepted from the grant of 1864) and yet be entitled to indemnity therefor.

This would appear to have been the opinion of the Commissioner of the General Land Office. In the case of Northern Pacific Railroad Company *v.* Mary Bardon, he says:

"As the cash entry by the heirs of James Robinson, Jr., deceased, was existing on said tract at the date of the

attachment of the rights of said road, viz., November 2, 1857, and was not canceled until August 5, 1865, I think the tract was excluded from said grant."

[Exhibit "R," Rec., 52 (126).]

No mention is made of the act of 1864, which must have been passed upon if the lands within the place limits of the act of 1856 were regranted.

Justice Harlan, speaking of this grant, says:

"The first section of the act of 1864 should receive the same construction that would be given if it had, in words, *added* four sections in width to the place limits and five miles to the indemnity limits on each side of the road."

Wis. Cent. R. Co. *v.* Forsythe, 43 Fed. R., 880.

If this land was not, as we contend, covered by the grant of May 5, 1864, it remained public land so far as the grants to the St. Croix and Lake Superior road are concerned, inasmuch as it was excepted from the grant of 1856, and the various withdrawals thereunder.

2. But even if it would otherwise have passed by the act of 1864, it was excluded from the terms thereof by the pre-emption entry of James Robinson, Jr., existing thereon, both at the date of the grant and at the date of the filing of the map of definite location under that act. We think the line of the St. Croix and Lake Superior road must be taken, as fixed at the date of the grant, May 5, 1864. The route of the St. Croix and Lake Superior road was definitely fixed after the grant of 1856 by filing a map thereof with the Secretary of the Interior November 5, 1857. Until that time the line of the road could be located anywhere within the general boundaries fixed by the act; but once definitely fixed, and the map thereof filed in the office of the Secretary of the Interior, it ceased to be within the power of the company to relocate the route at will. The sections granted

were ascertained, and the title vested in the company by the grant attached thereto, and it was not within the power of the company to relinquish these lands and take others in their stead without the consent of Congress.

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 634;
Van Wyck *v.* Knevals, 106 U. S., 366;
Wis. Cent. R. Co. *v.* Forsythe, 43 Fed. R., 878;
Sioux City and Land Co. *v.* Griffey, 143 U. S., 38.

The act of 1864 was, as we have said, supplementary to the act of 1856. It was made for the purpose of aiding in the construction of the same roads that were to be aided by the earlier grant. It is beyond controversy that Congress did not contemplate the construction of two roads between the same termini; the one under the grant of 1856, and the other under the later and larger grant of 1864. It can not be supposed that Congress in legislating upon such an important grant of public lands for public uses, intended to have two parallel roads between these terminal points, or that it was intended to encourage the building of roads, by a grant of public lands, the traffic between those points being insufficient in itself to justify the building of a railroad for that alone, and yet to discourage the building of those roads by dividing up that traffic. And since the line of the road was already definitely fixed under the act of 1856, and the legal title to the lands granted thereby vested in the grantee, subject only to a forfeiture for breach of conditions (a fact known to Congress), and since the grant of 1864 was to aid in the construction of the same roads, it must be presumed to have been the intention of Congress that the later grant should be taken along the lines already located under the earlier grant. We say the fact of the definite location of the line of the road under the earlier grant was known to Congress. The existence of such knowledge plainly appears from

the terms of the later grant. The lands granted under the act of 1856 were to be deducted from the amount of lands given in the later act, and indemnity was provided in the act of 1864 for losses from the grant of 1856. These provisions could only have been made because the grant of 1856 had already been located, and because that grant was to fall within the external limits of the larger grant of 1864, inasmuch as only these lands granted in 1856 which fell within the limits of the grant of 1864 were to be deducted. If the grant of 1856 had not already been located, or that location was to be changed, no necessity or reason could exist for preserving the grant of 1856. The rights of the company would attach only upon such relocation of the line. All deficiencies in the grant of 1856 would coincide with the deficiencies under the grant of 1864. The grants would attach to the specific sections at the same date. The grant of 1856 would practically be merged in that of 1864, and the provisions for keeping them separate and distinct would be but an empty show. There is nothing in the act of 1864 forfeiting the lands the title to which had vested by the location of the road under the grants of 1856. Indeed, at the date of the later grant, there was no breach of conditions of the earlier grant, and no power in Congress to declare a forfeiture. There is no provision in the act of 1864 for the relinquishment by the companies or State of the lands granted by the act of 1856, which might fall without the limits of the grant provided for in the act of 1864, as a condition precedent to the acceptance of the later act. Therefore, unless the act of 1864 contemplated that the grants made thereby should be located along the lines already fixed under the act of 1856, there would remain, so far as the lines diverged, a large area of lands outside the limits of the grant of 1864, the title to which would be vested in the companies under the grant of 1856. We think it

clear that such was not the intention of Congress. And if it was the intention of Congress that the grant made by the act of 1864 was to operate along the line of definite location already fixed under the act of 1856, it must be held that that line was fixed immediately upon the date of the act. The granted or place lands under the act of 1864 immediately became identified; the right of the company to the specific sections vested; and the grant took effect on the date of its approval, May 5, 1864; and as at this date the land was still covered by the pre-emption entry of Robinson and was occupied by his heirs, it was excluded from the grant by the terms of the granting act. The act of May 5, 1864, was construed both by the railroad company and by the Interior Department as having the effect here claimed for it. In his letter of May 5, 1865 [Exhibit "D," Rec., 41 (106), Mr. Baldwin says: "I wish to renew my request in behalf of said company that the lands be withdrawn from market in compliance with said grants."

It would appear therefrom that such a request had been made prior to the resolution adopting the original line of definite route under the grant of May, 1864, and it appears from Exhibit "E," Rec., 42 (108), that prior to the receipt of any information as to the adoption of the line under the grant of 1864, the Interior Department had already prepared the lists of the lands granted by the act of 1864 (and such lists could not have been prepared had they not considered that the line of the road had already been definitely located); and that such lists had been submitted to the Secretary of the Interior and were by him approved on the day of the receipt of the notice of adoption of the original line by the company.

The commissioner in the above-mentioned Exhibit "E" said:

"In reply to your request contained in your letter for a withdrawal of lands for said road, I would state that

supplemental lists of lands for the same were submitted to the Secretary of the Interior on the 3d inst., and approved by him on the 6th, which, with the lands heretofore approved to said State for said road, makes the full quantity of land granted therefor. * * * The grant to Wisconsin for the road being satisfied, no withdrawal can be ordered."

The land covered by the entry of Robinson, not being public at this time, was not included in these lists.

In any event, the line of definite location under the act of May 5, 1864, must be considered as definitely fixed not later than May 5, 1865, when the said company filed in the office of the Commissioner of the General Land Office a resolution adopted by its board of directors April 22, 1865, accepting the grant made by the act of 1864, and conferred upon said St. Croix and Lake Superior Railroad Company by the State of Wisconsin, and adopting as the line of definite location of said railroad under said grant the line of said railroad as then located by maps on file in the Land Office at Washington, D. C. [Stip., secs. 15 and 16, Rec., 34 (94–5.)]

And since the land in controversy was at that time covered by the uncanceled entry of Robinson, it was excepted from the provisions of such grant.

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 629;
H. & D. R. D. Co. *v.* Whitney, 132 U. S., 357;
S. C. and C. Land Co. *v.* Griffey, 143 U. S., 32.

And this land therefore never passed to the St. Croix and Lake Superior Company under the grant of 1864, but, so far as the rights of that company are concerned, remained public land.

Nor was it withdrawn or reserved by executive order of any kind under this act. February 28, 1866, the Commissioner of the General Land Office forwarded to the local land officers a diagram of the line of the St. Croix and Lake Superior Railroad. [Stip., sec. 18, Rec., 35 (96).]

This did not constitute a withdrawal. The policy of the Government was and is to keep the public lands open to settlement. As appears by Exhibit "E" the full quantity of lands granted to the St. Croix Company had been listed and set aside for that company. To hold, then, that it was the intention of the Interior Department to contravene the settled policy of the Government and withdraw lands from settlement when no necessity existed therefor required clear and plain language. A withdrawal had already been refused, and we think it is clear that it was not the intention of the Commissioner that the filing of the diagram in the local land office should operate as a withdrawal. But if such was the intention, it would not withdraw this land. As we have seen, the land was excepted from the grant by virtue of the pre-emption entry of Robinson. Orders of withdrawal are to serve two purposes:

First. As to the place lands to which the rights of the company have already attached; and as to which the action or non-action of the Interior Department is immaterial; and upon which the law itself operates as a legislative withdrawal, it is the exercise of a wise precaution by the department to give such information to the local land offices as may serve to guide aright those seeking settlements on the public lands. It is but to give publicity to what the law itself declares.

Buttz *v.* N. P. R. R. Co., 119 U. S., 72;
Denny *v.* Dodson, 32 Fed. R., 909;
S. P. R. R. Co. *v.* Dull, 22 Fed. R., 494;
S. P. R. R. Co. *v.* Orton, 32 Fed. R., 469.

Second. As to the indemnity lands, its purpose is to preserve these lands from the location of pre-emption, homestead, or other claims thereon prior to the date of selection by the company.

St. P. M. & M. Ry. *v.* Greenhalgh, 26 Fed. R., 565;

Prest *v.* N. P. R. R. Co., 2 L. D., 508;
A. T. & S. F. R. R. Co. *v.* Rockwood, 25 Kas., 298;
N. P. R. R. Co., 2 L. D., 514;
Wolcott *v.* Des Moines, 5 Wall., 688.

The land in controversy fell within the place limits of the act of 1864, if it fell within the limits of that grant at all, and was excepted therefrom. After the filing of the map of definite location the St. Croix company could never acquire any interest in this specific tract. A preemption claim, being attached to the land when the act of 1864 was passed and when the line of definite location thereunder was fixed, it was not granted by the act to the company, and could not get into the grant and become the property of the company thereafter.

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 639;
Wis. Cent. R. Co. *v.* Forsythe, 43 Fed., 886;
S. C. and C. Land Co. *v.* Griffey, 143 U. S., 41.

There could be no object in withdrawing this land for the benefit of a grantee who could not acquire title thereto; and the constant construction of all executive orders of withdrawal by the Interior Department is that lands which are excepted from the grant, not being within the reason of the withdrawal, are not included therein, although within the general terms employed.

Trepp *v.* N. P. R. R. Co., 1 L. D., 382;
Prest *v.* N. P. R. R. Co., 2 L. D., 506;
S. P. R. R. Co., Copp's Pub. L. L. for 1875, p. 375;
A. T. & S. F. R. R. Co. *v.* Rockwood, 25 Kas., 299.

This construction of orders of the Interior Department by that department is conclusive upon the courts. It is a primary rule of interpretation that laws must be so construed as to express the intent of the law-making body. The rules of construction are merely the means of arriv-

ing at that intent. Where the meaning of the law promulgated by a body in its legislative capacity is solemnly declared by that body, sitting in a judicial capacity, that construction is binding upon the courts. The land here in controversy was not, therefore, affected by any of the withdrawals or grants for the St. Croix road.

In the case of the Northern Pacific Railroad Company *v.* Mary Bardon the Commissioner of the General Land Office held that by reason of the pre-emption entry of James Robinson, Jr., this land was excepted from the grant of the St. Croix road. In so far as this decision construed the effect of the actions of the land department under the grant to the St. Croix and Lake Superior Railroad Company it is binding upon the courts. And unless those grants affected the land by virtue of the laws of Congress, independent of any regulations or orders of the Interior Department, it must be held that the land remained public.

In the conclusions that we have reached, that this land remained public, notwithstanding the grants and withdrawals from the St. Croix road, the appellant necessarily concurs. Upon this fact is based her title to the land. At the hearing before the local land officers in the final proof of appellant, the successor of the St. Croix road, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, appeared and claimed the land. This claim was denied by appellant, who contended that the land was public. At that time the withdrawals under the grants of 1856 and 1864, if any there were, were in full of force and effect. The register and receiver found, however, that the land was excepted from those grants and the withdrawals thereunder, and that the appellant was entitled thereto. In this finding the railroad company acquiesced and took no appeal. On the appeal by the appellee the same claim was urged by the appellant before the Commissioner and the Secretary,

and each of these officers sustained her claim. It is conceded, therefore, by all the parties that this land was in no wise affected by the grants and withdrawals for the St. Croix road.

IV.

The land in controversy is beyond the limits of the grant made by the third section of act of Congress approved May 5, 1864, and was not within the limits of the withdrawal made thereunder December 10, 1869.

By the act of June 3, 1856 (11 Stat., 21), lands were granted to the State of Wisconsin to aid in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, between townships 25 and 31; and thence to the west end of Lake Superior and to Bayfield; and also from Fond du Lac, on Lake Winnebago, northerly to the State line. No provision was made in this act for a road from Bayfield to the west end of Lake Superior, or to Superior City, by the route subsequently adopted by the Portage, Winnebago and Superior Railroad Company; and the road afterward constructed by that company was not constructed under this act. The first section of the act of Congress of May 5, 1864 (13 Stat., 66), provided for the construction of a railroad from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said company, to Bayfield. And by the third section of the act it provided for the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction to Bayfield, thence to Superior, on Lake Superior; and to aid in the construction of this road gave "every

alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road. * * * But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said State, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid. * * * ." This grant was duly accepted by the State of Wisconsin. That State, by an act approved April 6, 1866, entitled "An act to incorporate the Winnebago and Lake Superior Railroad Company, and to execute the trust created by section 3 of the act of Congress, entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864," created said Winnebago and Lake Superior Railroad Company, and empowered it to construct a railroad from "Doty's Island, on the most direct and feasible route to Bayfield, thence to Superior on Lake Superior, by way of Waupaca, in the county of Waupaca, and Stevens Point, in the county of Portage, and an extension of said road from Doty's Island to the city of Appleton;" provided, that said railroad from said Stevens Point to Superior shall be constructed and operated by the company hereby created, jointly and in common with any railroad company authorized to construct and operate a railroad from Portage City to Superior by way of Stevens Point, aforesaid; and provided that said companies may consolidate. And by

section 8 of this act invested said company with the title "to one equal, undivided half of the lands pertaining to that portion of the road of said company which shall be located and constructed from Stevens Point to Superior * * * granted or conferred, or intended to be granted or conferred, by section 3 of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864."

Chapter 314, Local Laws of Wisconsin, 1866.

And by an act approved April 9, 1866, entitled "An act to incorporate the Portage and Superior Railroad Company, and to execute the trust created by an act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864," that State incorporated the Portage and Superior Railroad Company and empowered it to construct and operate a railroad "from the city of Portage, in the county of Columbus, by way of Stevens Point, in the county of Portage, to Bayfield, thence to Superior on Lake Superior." Provided, that said railroad from Stevens Point to Superior should be constructed and operated in common with any railroad company that may be authorized to locate, construct and operate a railroad from Doty's Island, in the county of Winnebago, to Superior, by way of Stevens Point; and further provided, that said companies may consolidate. And by section 3 of said act required said company to construct a line of railroad "from said city of Portage, by way of the city of Ripon, in the county of Fond du Lac, and the city of Berlin, in the county of Green Lake, to Stevens Point, and thence to Bayfield and to Superior on Lake Superior," provided that Congress should, prior to March 4, 1867, give its assent to the route of said road from the city of Portage to Bayfield, and to Superior on

Lake Superior, as above set forth, and "shall consent to the selection and application of the lands granted to the State of Wisconsin by the third section of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond du Lac, in a northwestern direction to Bayfield, and thence to Superior on Lake Superior, for and to the line of the said railroad, as the same is defined and prescribed in this section, in the same manner and with the same effect as if the said railroad was located and constructed in strict accordance with and upon the route prescribed in said act of Congress." And by the ninth section of said act invested said company "with the title to the lands * * * granted or conferred, or intended to be granted or conferred, by section 3 of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864: *Provided*, That the said Portage and Superior Railroad Company shall be entitled to and invested with an undivided one-half only of the said lands pertaining to that portion of the railroad authorized by this act, which shall be so located and constructed from said Stevens Point to Superior."

Chapter 362, Local Laws of Wisconsin, 1866.

[Answer, Rec., 27–8 (81–2).]

June 21, 1866, Congress, by a joint resolution, gave its consent to the location of the line of the Portage and Lake Superior Railroad Company as described in the act of incorporation, and to the application of the lands granted by the third section of the act of May 5, 1864, for the line of railroad as therein described. (14 Stat., 360.)

The State of Wisconsin, by an act approved March 6,

1869, entitled "An act to authorize the Portage and Lake Superior Railroad Company to consolidate with the Winnebago and Lake Superior Railroad Company under the name of the Portage, Winnebago and Superior Railroad Company," (Chap. 257, Local Laws of Wisconsin, 1869), authorized those companies to consolidate and become and be a corporation, and in accordance with said act said companies consolidated and became the Portage, Winnebago and Superior Railroad Company, with the same rights, powers, privileges, grants, and franchises held by the separate companies.

September 7, 1869, the Portage, Winnebago and Superior Railroad Company filed a map of its definite route extending northwestwardly to the City of Superior. And December 10, 1869, the Commissioner of the General Land Office transmitted to the register and receiver at Bayfield, within which land district the land in controversy was situate, a diagram of the line of said road with the ten and twenty mile limits designated thereon, and ordered the withdrawal of the odd-numbered sections of land falling within said limits. [Answer, Rec., 28, (82); stip., secs. 19, 20, 21; Rec., 35 (96); Exhibit "F," Rec., 43 (109–10); Exhibit G.]

It is contended by the appellant that the land in controversy was included in such withdrawal and remained a part thereof until the order of July 12, 1883, fixed such terminal limit as alleged in the complaint, and excluded the land from said withdrawal; or that the land was at least *sub judice* until said July 12, 1883; and that in either event the land was excluded from the withdrawal for the Northern Pacific of 1870 on map of general route.

The only lands granted to the Portage, Winnebago and Superior Railroad Company are those lands granted in the third section of the act of Congress of May 5, 1864 (13 Stat., 66).

14 U. S. Stat., 360;

Local Laws of Wis., 1866, chap. 314, sec. 18;

Local Laws of Wis., 1866, chap. 362, secs. 3 and 9;
Local Laws of Wis., 1869, chap. 257;
Wis. Cent. *v.* Forsythe, 43 Fed. R., 867.

By this section lands were granted to aid in the construction of a road "from Portage City * * * to Bayfield, and thence to Superior on Lake Superior." (13 Stat., 66, 3d sec.)

The Portage, Winnebago and Superior Railroad Company was authorized to locate its line of road to Superior City only, and had no authority to extend its road beyond that point.

Local Laws of Wis., 1866, chap. 314;
Local Laws of Wis., 1866, chap. 362;
Local Laws of Wis., 1869, chap. 267.

And since the map of the definite route of the Portage, Winnebago and Superior road was not filed until September 7, 1869, and no withdrawal thereunder was made until December 10, 1869, it is evident that the statement made in appellant's brief on page 12, subdivision 3 of section 21, that the land in controversy was covered by a withdrawal made on the map of definite location filed by the Portage, Winnebago and Superior Railroad Company on the 5th of November, 1857, is a mistake of fact. It is also evident that the statement in section 22 of appellant's brief, on page 15, that the tract in controversy has been subject to all such rights as result from said grants, withdrawals, and the following facts, viz.: Order of the Secretary of the Interior fixing terminal limit of grant of 1856 to Wisconsin as it pertains to the completed road under said grant, July 12, 1883, modifying the order of the Commissioner of the General Land Office and the Secretary of the Interior of May 29, 1856, whereby the said western limit of said grant was fixed at the easterly bank of the St. Louis River as the same runs south from

the west end of Lake Superior, is also a mistake of fact. The terminal limit fixed July 12, 1883, by the Commissioner of the General Land Office had no relation to the grant of 1856, but was the terminal limit fixed to the grant made by the third section of the act of May 5, 1864. [Complaint, Rec. 22 (70); stip., secs. 22–23–24–25, Rec., 35–6 (96–7).]

The grant made to the Portage, Winnebago and Superior Railroad Company, by the third section of the act of May 5, 1864, is a grant *in præsenti*.

Schulenberg *v.* Harriman, 21 Wall., 60;
Wis. Cent. R. Co. *v.* Price Co., 133 U. S., 496.

The grant, however, remained afloat until, by the fixing of the line of definite location the precise sections granted were ascertained. The act of Congress granted "every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road" with certain exceptions. Four conditions are enumerated which must be fulfilled before the lands pass by the grant. (1) The lands must be public; (2) it must be embraced within an odd-numbered section; (3) it must be on the line of the road; and, (4) it must be within ten miles of the line of the road. Lands to be "on the line of the road" must be along the general direction or course of the road and within lines perpendicular to it at each end.

U. S. *v.* B. & M. R. R. Co., 98 U. S., 339;
U. S. *v.* B. &. M. R. R. Co., 4 Dill., 302;
C. St. P. M. &. O. Ry. Co., 6 L. D., 207.
N. P. R. R. Co., 3 L. D., 450;
N. P. R. R. Co., 3 L. D., 478;
N. P. R. R. Co., 5 L. D., 461;
1 Lester's Land Laws, 527;
Flint & Pere Marquette R. R. Co., 1 L. D., 394;
Scott *v.* K. P. Ry. Co., 5 L. D., 468;
5 Op. Atty. Gen., 518.

Lands beyond the terminal lines so drawn are not "on the line of the road" and are not granted, and no act of the department officers can extend the scope of the grant and pass title to any lands beyond this limit.

Neer *v.* Williams, 27 Kas., 67.

It follows that when the line of road was located and the map thereof filed in the office of the Commissioner of the General Land Office September 7, 1869, the identity of the lands granted was mathematically ascertained.

Grinnell *v.* Railroad Co., 103 U. S., 742;
K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640;
N. P. R. R. Co., 3 L. D., 450.

It is conceded that the land in controversy lies beyond the terminal limit of the grant to the Portage, Winnebago and Superior Railroad Company fixed according to the rule hereinbefore laid down.

See Exhibits "G" and "K."

This, then, was the condition of the grant to the Portage, Winnebago and Superior Railroad Company at the time the order of withdrawal was made by the Secretary of the Interior. The limits of the grant were defined; the identity of the lands granted was mathematically ascertained; the land in question was beyond the limits of the grant; and the company had not, and could never acquire, any interest therein.

When the map of definite location was filed, the title granted attached immediately to the specific sections; and thereafter they could not be subject to sale, preemption, or other disposal.

Van Wyck *v.* Knevals, 106 U. S., 366.

And, as we have seen, the sole purpose of a withdrawal under these circumstances is, not to protect the

lands, which are fully protected by the grant, but to give such information to the local land officers as will serve to guide aright those seeking to settle on the public lands. And as it is conceded that this land fell within the place limits of the Portage, Winnebago and Superior grant [Answer, Rec., 28 (82)], if it fell within the grant at all, the sole purpose of the withdrawal of December 10, 1869, so far as it could relate to this land, would be to advise the public that it was not public, but had passed under the grant to the railroad company. And since it had in fact not passed under the grant (a fact necessarily known to the department), is it unreasonable to suppose that the department meant to advise the public that it *had* passed? The policy of the Government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country. The encouragement to settlement by aid for the construction of railways, was not intended to interfere with the policy of encouraging such settlement by sales of the land or the grant of pre-emption rights.

Winona and St. Peter R. R. Co. *v.* Barney, 113 U. S., 625.

Under these circumstances to warrant an interpretation of an order of withdrawal as intended to include land beyond the terminal line of a grant to a railroad company and which could never pass to that company under the grant within a withdrawal for its benefit would require the use of clear, indubitable terms in the language of the order. The language used in the order of December 10, 1869, is as follows:

"I enclose herewith a diagram of the Portage, Winnebago and Superior Railroad under the act of May 5, 1864, third section, and joint resolution twenty-first June, 1866, with the 10 and 20 mile limits of the land grant designated thereon.

"You are hereby directed to withdraw from sale or location, pre-emption or homestead entry, all the odd-numbered sections of land falling within these limits. * * *"

Exhibit "F" [Rec., 43 (110).]

The only lands ordered to be withdrawn are those within the ten and twenty mile limits of the land grant. The order was complete in itself, and those lands only were withdrawn which were within its plain meaning and intent. The ten and twenty mile limits on the diagram accompanying the order did not constitute a part of the order, but were merely supplementary thereto and explanatory thereof. An error in delineating the lines on the diagram could in no wise change the reservation. This court, speaking of errors of this nature, said:

"No one now supposes that the east branch was in fact the Des Moines River. It is undoubtedly true that at some time some officers of the Government, as well as some officers of the State, supposed the branch was the main river, and acted accordingly; but that does not change the geographical fact that what was taken for the river was only a branch. The lists of selections along the branch, and their approval by the secretary, were mistakes, which the record shows were corrected in the final settlements between the State and the United States by allowances in account. The same may be said of the marks on the plats sent out from the General Land Office to the local land officers. They were clerical mistakes, growing out of an imperfect knowledge of the geography of the country. They did not change the reservation, but only gave wrong information as to what it was."

Dubuque, etc., R. R. Co. *v.* D. M. V. R. R. Co., 109 U. S., 335.

But if we concede that the diagram constituted a part of the order, our construction thereof is not changed. The lines drawn on the diagram as indicating the ten

and twenty mile limits were "limits of the land grant" only until they intersected with the terminal line. Beyond those points they cease to be the lateral "limits of the grant" and the lands included within their prolongation were not withdrawn.

It can not be denied that the meaning and intent of the order was to include lands within the "limits of the grant," and to exclude all others. This is placed beyond all question by the words of the order: "You are * * * to regard as increased in price to two dollars and a half per acre all the even-numbered sections within the ten-mile or *granted* limits." Here it is obvious the commissioner had reference but to lands to which the company's rights had attached by filing its map of definite location to lands "on the line of the road," and therefore within the terminal limit. These alone were *granted* limits.

Barney *v.* W. & St. P. R. R. Co., 117 U. S., 232.

To assume that the commissioner intended to raise the price of the even-numbered sections beyond the terminal limits fixed by the act itself is to presume that he meant and intended an unlawful act. The right to sell the even-numbered sections at double price depended upon the fact that the odd-numbered sections had been granted.

U. S. *v.* McLaughlin, 30 Fed. R., 158.

No such presumption can be made. Nor had the Secretary of the Interior or the Commissioner of the General Land Office authority to extend the withdrawal beyond the terminus of the grant. Their sole authority to use the general power of withdrawal vested in the executive branch of the Government was derived from the act.

Atlantic and Pacific R. R. Co., 4 L. D., 460.
Trepp *v.* N. P. R. R. Co., 1 L. D., 383.
U. S. *v.* McLaughlin, 30 Fed. R., 152.

It must be admitted, then, that it was the intention of the Commissioner to withdraw only such lands as were included within the grant. And the court will, if possible, so construe the order as to carry out that intent. Is such a construction possible? We think it is not only possible, but also that it is the only possible construction of which the order is susceptible. It is entirely consistent with the diagram accompanying the order (Exhibit "G"), and is the *only* one that is consistent therewith. No terminal limit was designated on the diagram. [Exhibit "G", exhibit "H," Rec., 43 (110); exhibit "I," Rec., 44 (112); exhibit "J," Rec., 45 (113–14), and exhibit "K."] None was necessary. The terminal line was fixed by the terms of the granting act and the location of the road. It was fixed as soon as the sections "on the line of the road" had been determined. Upon the definite location of the road it became fixed with mathematical certainty. It could be as easily determined by the register and receiver as by the Commissioner. Had any other terminal line been intended it would have been designated upon the diagram, as the local land officers would have had no other means of determining its location.

Less than three years after the issuing of the order of withdrawal of December 10, 1869, it was construed by the local land officers as not to include the land in question. December 2, 1871, Owen Sheridan made application to enter this land, and his entry was allowed. Such could not have been the case had it been supposed that the land was withdrawn under the order of December 10, 1869; and in 1881 when the appellant first filed upon the land such withdrawal was in the same condition as when the rights of the Northern Pacific accrued; and again the filing was allowed. [Exhibit "O," Rec., 47 (117–8), and Exhibit "P," Rec., 48 (119–20).] The appellant settled upon the land and made her final proof

before the register and receiver, claiming that this land was public land, not included in any of the railroad grants or withdrawals. In 1883 she appeared before the Commissioner of the General Land Office on the appeal by the Northern Pacific Railroad Company [Exhibit "R," Rec., 51 (125)], and in the decision in her favor no mention is made of the rights of the Portage, Winnebago and Superior Railroad Company; and finally in 1886 the case was decided by the Secretary of the Interior. In all of these cases the question as to whether the land was included in the withdrawal of December 10, 1869, was necessarily involved. Upon the determination of that question in the negative depended all right of the appellant to this land; and every decision in her favor must be considered as deciding that this land was not included in the withdrawal for the Portage, Winnebago and Superior Railroad Company. Such construction by the Interior Department is conclusive upon the court. In this construction the Portage, Winnebago and Superior Railroad Company and its successors, the Wisconsin Central Railroad Company, constantly acquiesced. It was never supposed by that company that said land was included within its withdrawal, and no claim was ever made by it thereto. (Stip., sec. 32.) Clear indeed must be the case when a land-grant company relinquishes without a contest any claim that it may have to land.

An order of withdrawal, like a grant, must be construed strictly. Nothing is included therein which is not within the plain intent and meaning of the order.

1 Lester, 539;
Prest *v.* N. P. R. R. Co., 2 L. D., 507–8;
K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 637–8–9.

If, however, we violate this rule, assume that it was the intention of the commissioner to contravene the settled policy of the Government; assume that it was the

intention of the commissioner to exceed his authority; assume, contrary to the plain language of the order, that it was the intention to include the lands beyond the terminus of the grant; assume that it was intended to include, and did include, all lands falling within the lines drawn on the diagram as the lateral limits, this land would still lie beyond the withdrawal. It is beyond a line connecting the terminus of the road at Superior with the extreme end of the line designating the lateral limit. (Exhibit "G.")

The foregoing argument also disposes of any claim that such land was *sub judice*. Immediately upon the filing of the map of definite location the limits of the grant were mathematically ascertained, and the land in controversy lay without those limits.

When the land ceased to be the subject of controversy it was no longer *sub judice*.

U. S. *v.* S. P. R. R. Co., 45 U. S., 609;
Ryan *v.* C. P. R. R. Co., 99 U. S., 388;
S. P. R. R. Co. *v.* Dull, 22 Fed. R., 495;
U. S. *v.* C. P. R. R. Co., 26 Fed. R., 284–5.

V.

No pre-emptions or other claims or rights, of any nature or description, could attach to the land in controversy between the date of the filing of the map of general route, August 13, 1870, and the date of filing the map of definite location, July 6, 1882, which could change the status of said land so as to exclude it from the grant; and the land being free from pre-emption or other claims or rights not reserved, sold, granted, or otherwise appropriated on the 13th day of August, 1870, the title vested in the Northern Pacific Railroad Company attached to this specific land upon the filing of the map of definite location July 6, 1882.

Appellee duly fixed the general route of its road by filing a plat thereof in the office of the Commissioner of

the General Land Office August 13, 1870, and the land in controversy was on and within twenty miles of the line of said general route so fixed. September 15, 1870, the Commissioner of the General Land Office withdrew the public lands within twenty miles of said line of general route. [Complaint, Rec., 16 (59–60); Rec., 17 (62); answer, Rec., 24–5 (75–6); Stip., sec. 26, Exhibit "L," Rec., 36 (88).]

This withdrawal was received by the local officers prior to October 1, 1870. [Complaint, Rec., 17 (61); answer, Rec., 24 (75–6).]

By the sixth section of the act of July 2, 1864, it is provided that after the general route should be fixed "the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed," except by appellee. By virtue of this section, as soon as a map of the general route was filed in the office of the Commissioner of the General Land Office, all the public, odd-numbered sections of non-mineral land within twenty miles of said route as fixed were reserved from sale, entry, or pre-emption for the benefit of the grantee. Thereafter all settlements and expenditures upon such lands were useless. No interests against the rights of the company could be acquired. Any attempt by the department to throw open the land for settlement would be void and of no effect.

Buttz *v.* N. P. R. R. Co., 119 U. S., 71;
St. P. & P. R. R. Co. *v.* N. P. R. R. Co., 139 U. S., 17;
Denny *v.* Dodson, 32 Fed. R., 909;
U. S. *v.* Curtner, 38 Fed. R., 8;
N. P. R. R. Co. *v.* Lilly, 9 Pac. R., 118;
U. S. *v.* N. P. R. R. Co., 41 Fed. R., 842;
N. P. *v.* Barden *et al.*, 46 Fed. R., 604;
S. P. R. R. Co. *v.* Orton, 32 Fed. R., 468.

The action of the Interior Department, therefore, in

permitting the entry of this land by Owen Sheridan December 2, 1871 [Stip., sec. 28, Exhibit "N," Rec., 36 (98)], and the entry of Mary Bardon [Stip., secs. 29 and 30, Exhibits "O" and "P," Rec., 36–7 (99)], was unauthorized by law if the land was public land at the date of fixing the line of general route by the Northern Pacific Railroad Company; and the existence of the Bardon entry at the date of definite location would not prevent the land from passing under the grant.

The law having prohibited entries upon this land after the fixing of the general route, the action of the Interior Department in allowing such entries, and the entries themselves, were void, as distinguished from voidable; and a void entry will not appropriate land, or attach thereto a claim or right such as will exclude the land from the grant. A void entry has no legal force whatsoever. It is incapable of confirmation or ratification; it is a mere nullity, and has, from a legal standpoint, no existence. It will not, therefore, operate to bring a tract of land within the exceptions named in the grant.

Denny *v.* Dodson, 32 Fed. R., 809;
U. S. *v.* Curtner, 38 Fed. R., 1;
S. P. R. R. Co. *v.* Wiggs & Newman, 43 Fed. R., 333;
St. P. & P. R. R. Co. *v.* N. P. R. R. Co., 139 U. S., 17;
Buttz *v.* N. P. R. R. Co., 119 U. S., 71;
Doolan *v.* Carr, 125 U. S., 618.

In H. and D. Ry. Co. *v.* Whitney, 132 U. S., 357, the Supreme Court, after pointing out various defects in a certain entry which was held to have excluded land from the grant to a railroad company, said:

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity."

And no case can be found where entries or patents which were void, and nullities, have been held to bring land within the exceptions from a railroad grant.

The land in controversy, having been excepted from the grants to the St. Croix Company and to the Portage, Winnebago and Superior Company, and from the withdrawals thereunder, no claims or assertions of claims by such companies would bring the land within the clause excluding lands from the Northern Pacific act that were not free from pre-emption or other claims or rights. The land having been excluded from those grants, such claims, if any there were, even if permitted by the Interior Department to have ripened into a patent, would be mere nullities, and the patent itself would be void. A patent in favor of the railroad company for a tract of land, if the tract be in fact excluded from the grant, vests in the patentee no right or claim whatsoever, and will not take the land out of the category of public lands.

Doolan *v.* Carr, 125 U. S., 618.

The word "claim" in the phrase "free from pre-emption or other claims or rights" does not mean the mere unauthorized assertion of an interest or right by a party. General terms following a specific term take color and meaning from such specific term (Suth. Stat. Const., sec. 268).

And the words "claims or rights" following the term "pre-emption" as they do, take color and meaning from that term. The phrase is equivalent to "free from pre-emption claims or rights and other claims or rights of a similar nature." The pre-emption right is "the right to enter lands at the minimum price in preference to any other person, if all the requirements of law are complied with. The settlement, declaratory statement, and proof are not the pre-emption, but only the means of securing the right of pre-emption."

Nix *v.* Allen, 112 U. S., 129;

Myers *v.* Croft, 13 Wall., 291;
Camp *v.* Smith, 2 Minn., 138 (Gilf.);
McKean *v.* Crawford, 6 Kas., 118;
Dillingham *v.* Fisher, 5 Wis., 480;
Aiken *v.* Ferry, 6 Saw., 87;
J. B. Raymond, 2 L. D., 854.

What is a pre-emption claim? "Claim," says Mr. Webster, is "a demand of a right or supposed right; a calling on another for something due or supposed to be due. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another."

In the phrase "pre-emption claim," as used in the pre-emption laws, the word "claim" is used in the sense of "a right to claim or demand." The phrase appears to have been used first in the act of Congress of March 3, 1843 (5 Stat., 619). The second section of that act provides "that in any case where a party entitled to claim the benefits of any of the pre-emption laws shall have died before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party or one of the heirs to file the necessary papers to complete the same." Here Congress speaks of a pre-emption claim as the subject of "consummation," "establishment," and "completion." The fifth section of the act requires the claimant to make known his claim in writing within a certain time, "otherwise his claim to be forfeited and the tract awarded to the next settler."

We think it apparent from this fifth section that the pre-emption claim which is to be forfeited is not the tract which is to be awarded to the next settler. "Consummation," "establishment," "completion," and "forfeiture" are terms clearly inapplicable to a "demand of a right or supposed right." The mere assertion of an in-

terest or right, a "demand," or "a calling on another for something due or supposed to be due," is not the subject of a "consummation," "establishment," or "forfeiture." Such terms clearly refer to "a right to claim or demand." And a pre-emption claim is a right secured by a compliance with the law to demand the benefits given by the pre-emption law.

U. S. *v.* Spaulding (Dak.), 13 N. W., 360;
Bowman *v.* Torr, 3 Ia., 573;
McLaughlin *v.* Menotti (Cal.), 26 Pac., 882.

Attorney-General Smith, defining "pre-emption claim," says:

"A pre-emption claim may be defined to be a right or interest subsisting under the pre-emption law, in some person, to a tract of public land, which, by a full compliance with the law, may be ripened into a perfect title."

W. P. R. R. Co. *v.* Spratt, Copp's Pub. L. L., 417 (1875).

By the fourth section of the act of Congress approved July 2, 1864 (amending the act of July 1, 1862, granting lands to aid in the construction of the railroad from the Missouri River to the Pacific Ocean), Congress provided that any lands granted by this act, or the act to which this is an amendment, shall not "defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim." By this act the term "pre-emption claim" is defined as a "lawful claim." And the same term used in the Northern Pacific act—an act in *pari materia* with this, and approved on the same day—must receive the same construction. This construction is further confirmed by the indemnity clause in the Northern Pacific act, which describes lands not "free from pre-emption or other claims or rights" as "pre-empted." That land is not pre-empted by a mere assertion of a party that he is entitled to pre-empt it is too clear for

argument. Whether that assertion be made by filing a declaratory statement, or otherwise, is immaterial. Unless it be sanctioned by law it can, at best, amount to nothing more than an attempt to pre-empt the land, and would not be sufficient to exclude the land from the grant.

Brown *v.* Corson (Or.), 19 Pac., 72.

Since a pre-emption claim is a "lawful claim"—that is, a right secured by a compliance with the law to demand the benefits given by the pre-emption law—the other claims referred to in the phrase "free from pre-emption or other claims or rights" must be claims of a similar nature; that is, claims secured by a compliance with the law, and recognized by the law. Thus, had a cattle king fenced in ten thousand acres of this land and held it by force, claiming it as his range, such claim would not be sufficient to exclude the land from a grant like that to the Northern Pacific. It would be a claim not recognized by law, nor secured by any compliance with the law, but attempted to be asserted in violation of law. And equally unlawful, and equally useless, were the assertions of any interest in, or right to, the land in controversy by the railroad companies from whose grants it was excepted.

Upon the question as to the meaning of the term "claim" much misapprehension has been caused in the Interior Department and in some of the courts by a misinterpretation of the language used by this court in the case of Newhall *v.* Sanger, 92 U. S., 761, and we may be pardoned for a brief examination of that case. There the question was as to whether a tract of land which was claimed under a Mexican grant at the time the line of the Central Pacific Railroad was definitely fixed was excluded from the railroad grant. The act of Congress approved March 3, 1851, 9 Stat., 631, created a commission to pass

upon and adjust the property rights under the various grants made by the preceding Mexican and Spanish governments. Prior to and during this period the extension of the public land system of the United States to California would have produced the utmost confusion to titles in real estate, and it was wisely withheld by Congress from that State until the Mexican and Spanish claims should be presented or barred by lapse of time. The act declared that all lands the claims to which should not have been presented within two years should be "deemed, held, and considered to be a part of the public domain of the United States." It was held that this act operated as a reservation of all of the lands, taking them out of the category of public lands, until the expiration of such two years without the presentation of a claim, and that where such claim was presented it operated to reserve the land until finally disposed of. By the act of March 3, 1853, 10 Stat., 244, Congress provided for the survey of the public lands in California, and by the sixth section of said act provided that all public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and "excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the preemption laws of 4th September, 1841, with all of the exceptions, conditions, and limitations therein, except as is herein otherwise provided." It was held that this act also operated to declare a reservation of the lands "claimed under any foreign grant or title" taking them out of the category of public lands.

And it was further held that the word "claimed," as used in this phrase, did not necessarily mean "lawfully claimed," and held, consequently, that all lands claimed under such foreign grants were reserved by the opera-

tion of the acts of 1851 and 1853, and becausedreserved, were excluded from the grant to the Central Pacific Company; but the court did not suggest or imply that the words "pre-emption claim" in the railroad grant meant other than precisely what Congress had defined it to mean, to wit, a lawful claim. The word "claim" in one case, meant the mere assertion of a right, whether with or without foundation, under a foreign grant. In the other case it meant the legal statute created only by a due compliance with the provisions of the pre-emption law. In the railroad grants the lands excluded were not those which an individual might assert that he claimed under the pre-emption laws, but those to which an actual claim had attached by virtue of the law itself is a very different thing. And all other claims or rights, as we have seen, must be similar claims or rights; that is, claims attached to the land by operation of law in order to exclude the same from the grant.

It has been repeatedly held by this court and by other courts, that, nothwithstanding one railroad company may be claiming land within its grant at the date the right of another company attaches thereto by definite location, if at all, yet that such land is not, by reason of that claim, excluded from the grant to the subsequent locator, if such subsequent locator has the prior grant.

K. P. Ry. Co. *v.* A. T. & S. F. R. R. Co., 112 U. S., 414;

St. P. & S. C. R. R. Co. *v.* W. & St. P. R. R. Co., 112 U. S., 720;

S. C. & St. P. R. R. Co. *v.* C. M. & St. P. R. R. Co., 117 U. S., 406.

And certainly the claim of a railroad company to a tract of land entirely excepted from its grant by reason of a prior entry can not be given a greater effect than its claim to lands apparently public, when it locates the

line of its road, but in fact within the limits of a prior railroad grant.

VI.

The land in controversy having been reserved from sale, pre-emption, or entry for the benefit of the Northern Pacific Railroad Company, August 13, 1870, the Interior Department had no further jurisdiction thereover for the purpose of permitting entries or taking final proof; and the failure of appellee to appear at the local land office in response to appellant's published notice of making final proof, and contest the same, did not and could not authorize the department to vacate the reservation created by Congress.

First. When the railroad company fixed the general route of its road, the law, *eo instanti*, forbade the sale, pre-emption, or entry, except by the company, of the lands within the description of lands "hereby granted." The sections "hereby granted" are the odd-numbered sections of non-mineral public lands to which the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, on each side of the line of general route, and within the prescribed distance thereof. As soon as the map of general route was fixed by filing a plat thereof in the office of the Commissioner of the General Land Office, the lands reserved thereon were, so far as surveyed, at once determined. Where unsurveyed, the determination was only postponed until the survey was made. This determination was a matter of record in the Department; for an examination of the plats of this land on file in the local land offices or in the office of the Commissioner of the General Land Office, would at once show whether any of the odd sections within the limits of the

reservation had been reserved for other purposes, sold, granted, or otherwise appropriated, or if a pre-emption or other claim or right had attached thereto. Such sections were not reserved. The express and unequivocal language of the statute is that the odd sections *not* in this condition were reserved.

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640;
B. & M. R. R. Co. *v.* Abink (Neb.), 15 N. W., 317;
W. P. R. R. Co. *v.* Tevis, 41 Cal., 493;
S. P. R. R. Co. *v.* Pursell (Cal.), 18 Pac., 887;
A. T. & S. F. R. R. Co. *v.* Mecklim, 20 Kas., 174;
The I. R. R. L. Co. *v.* Adkins, 38 Iowa, 354;
Kitteringham *v.* Blair, etc., Co. (Ia.), 35 N. W., 503;
Brown *v.* Corson (Or.), 19 Pac., 70;
Cahalan *v.* McTague, 46 Fed. R., 261.

It appeared from the departmental records that from and after August 13, 1870, this particular tract was reserved from entry. At that time it ceased to be public land. This fact the department was bound to know. The departmental officials had no authority to allow the entry of this land by Mary Bardon, for such entry was forbidden by law. They had no jurisdiction to take her final proof; the land having ceased by virtue of the reservation to be public, it was withdrawn from their jurisdiction. (R. S., 441.) That under these circumstances, the failure of the railroad company to appear at the taking of final proof and contest the entry can not estop it from asserting its rights elsewhere, requires no citation of authorities. That a tribunal absolutely without jurisdiction can not forfeit the rights of a party for failure to obey its citation, and appear to protest against the allowance of an entry it has no authority to allow, is too clear for argument. Nor is such failure to appear a waiver of any rights. The jurisdiction of the department to allow the entry does not depend upon the consent or non-con-

sent of the railroad company, but upon the law, and the law forbidding the entry, neither the absence of the company from the hearing, nor its actual consent to the entry, vests the department with authority to allow the same.

Second. The acts of Congress providing for contests before the department apply only to contests between settlers. The law does not contemplate a contest between a settler and a railroad company claiming, under a grant like that to appellee, and the department is not authorized to cite such a grantee to a hearing for the purpose of initiating such a contest.

Megerle *v.* Aske, 33 Cal., 89.

The grant to the Northern Pacific Railroad Company is of lands to which the United States has, in fact, full title, and which are, in fact, not sold, reserved, granted, or otherwise appropriated, and are, in fact, free from preemption or other claims or rights at the time the line of the road is definitely fixed; not of such lands only as the officials of the department may determine are in that condition. When the map of definite location is filed the title granted immediately attaches to all the lands within the limits of the grant, in fact, occupying the above status with reference to the title, and does not await the decision of the departmental officials with reference thereto, as would be the case were only those lands granted which the department should decide occupied such status.

Wis. Cent. R. R. Co. *v.* Price County, 133 U. S., 469;

St. P. and P. R. R. Co. *v.* N. P. R. R. Co., 139 U. S., 1;

Tarpey *v.* Deseret Salt Co., 142 U. S.;

N. P. R. R. Co. *v.* Barnes (N.D.), 51 N. W., 386.

The question of reservation on general route as applied

to each specific tract depends upon similar questions of fact, as distinguished from departmental determination of such questions. The preservation of the lands along the general route is a valuable franchise, in which the company has a vested property right, and is as fully protected in its hands under the constitution and laws as the property right in the lands themselves after the definite location.

U. S. *v.* Curtner, 38 Fed. R., 8.

The relation of the company to the United States, therefore, whether after definite location of the road or after fixing the general route only, is totally different from that of a settler applying to enter lands under the public land laws. The settler seeks to acquire title to what he concedes is public land; the railroad company, on the other hand, denies the Government title and asserts a vested interest in itself in hostility thereto. And growing out of these different relations, the Government possesses widely different powers with respect to the two parties. It must be borne in mind that the Government appears, with respect to public lands, in a dual capacity: first, as a law-making body; and, second, as a land owner. The rights, duties, and powers vested in it as a land owner are entirely separate and distinct from the rights, duties, and powers it possesses as a law-maker and law-giver. As a land owner the Government has the same rights and powers, and is bound by the same restrictions and rules, as the private land owner. It may convey its land or refuse to convey it. It may prescribe such conditions to the acquisition of its title as it sees fit. It may appoint an agent to attend to the conveyance of its lands, as it has done in the Secretary of the Interior. It may authorize such agent to determine with conclusive effect all questions as to the sufficiency of a settler's

compliance with the prescribed conditions precedent to acquiring its title to any of its lands, making such satisfactory proof of compliance one of the conditions. Where two parties claim each the preference right to enter a tract, it may authorize its agent, as it has in fact done, to cite the parties to appear before him and show by the proper proof which of the two has priority and make his decision upon all questions of fact conclusive. It may authorize him to disregard entirely the claims of either party who may fail to appear at such hearing, there being no vested rights, and award the land to the other. These powers it possesses with every other land owner. It is simply the right to dispose of his own property how and when he will. But while possessing the same powers, the Government is subject as a land owner to the same restrictions as other land owners. A grant, deed, or patent made by it for lands which it has already disposed of is as void and useless for the purpose of passing title as is the deed of a private individual for lands which he has disposed of. No more than a private person can the Government limit or restrict a grant it has made and under which the grantee has acquired vested rights. It can not, as a land owner, after it has disposed of certain lands and vested in its grantee the title thereto, provided the land fulfilled certain conditions at a certain time, determine in what manner it may please, and regardless of the grantee's rights, what lands in fact fulfilled those conditions and what did not, and make such determination a finality and binding on the grantee, unless its right so to do be specifically reserved in the grant or contract, any more than the railroad company or any other private individual, after it has sold lands of a certain character, can arbitrarily, regardless of the rights or wishes of the grantee, select the tribunal or appoint the agent by whom the final determination as to what specific lands are of that character is to be made; nor can it

more than the individual authorize the tribunal selected or agent appointed to cite the grantee to appear and show the facts upon which such grantee bases his claim under penalty of having that claim forfeited.

Kernan *v.* Griffith, 27 Cal., 90;
Megerle *v.* Ashe, 33 Cal., 89.

In its capacity as a law-maker and giver the Government is able to exercise greater power. It is authorized to create tribunals to determine the conflicting rights of parties, and empower such tribunals to compel the appearance of the necessary parties, subject, however, to the limitations contained in the Constitution. These limitations are important. The Government can not vest a tribunal with judicial powers unless that tribunal be a court within the meaning of the Constitution; nor can it, under the guise of establishing a remedy, vest any tribunal with authority to deprive a party of property without due process of law.

Spear, Fed. Judy., 4–8.

And since, under the act of July 2, 1864, appellee had acquired vested rights in the lands if they in fact fulfilled certain prescribed conditions, an erroneous final decision that a certain tract did not fulfill these conditions would deprive the company of its property, and, under the Constitution, could only be made by a proper tribunal whose proceedings in the matter had amounted to "due process of law." The proceedings before the department do not amount to "due process of law." The officers of the department are not authorized to issue subpœnas or other compulsory process to procure the attendance of witnesses. They can not, if a witness be present, compel him to answer questions. They can not compel him to submit to a cross-examination. They can not disregard such testimony as he may give in

chief, notwithstanding his refusal to submit to a cross-examination. The only evidence that can be brought before the tribunal is paid and voluntary testimony. That the proceedings before a tribunal of such limited powers is not "due process of law" is too clear for dispute.

Stimson *v.* Clarke, 45 Fed. R., 762.

A "day in court" does not constitute simply presence in court, either in person or by attorney, and listening to the evidence of an adverse party, and in the opportunity to have the testimony of such witnesses as may feel disposed to testify taken. Something more is required—an opportunity to bring out all the facts, both by cross-examination of hostile witnesses and compulsory processes to compel the attendance and procure the testimony of witnesses who, although absolutely necessary to the full development of the truth, may be unwilling to testify, are essential. In no other manner can the rights of parties interested be adequately protected. These are of the securities applicable to the determination of questions of right and title recognized by the general law. They are a part of the forms and judicial machinery provided by the wisdom of successive ages for the investigation of the truth of a matter in controversy, described by the court in Chicago, Milwaukee, and St. Paul Railway Co. *v.* State, 134 U. S., 418, as essential to "due process of law." Notice of hearing is useless if, at the hearing itself, the party is stripped of the weapons of defense.

It is apparent, therefore, that Congress can not authorize the department to finally determine any questions of fact upon whose determination depends the right of property vested in the railroad company.

And it is equally clear that Congress can not authorize such a tribunal to declare a forfeiture of property rights, or compel a party having such rights to submit them to

the jurisdiction of that tribunal under penalty of such forfeiture, whatever it may do by virtue of its power as a land owner with reference to a settler who claims no vested rights.

Nor has Congress attempted to vest the department with authority to cite a party claiming vested rights to appear before it in a contest where such rights are necessarily involved. An examination of the law shows that the Secretary is charged with the supervision of the public business over "the *public* lands, including mines" (R. S., 441).

By section 453, R. S., the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to perform all executive duties pertaining to the surveying and sale of the *public* lands of the United States or in any wise respecting such lands, and also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the Government. No jurisdiction is given the officials of the department over lands not public, other than for the performance of the ministerial duty of issuing patents for lands theretofore granted; and when lands cease to be public, the departmental jurisdiction thereover ceases also.

Tubbs *v.* Wilhoit, 138 U. S., 134;
Wright *v.* Roseberry, 121 U. S., 488;
Steele *v.* Smelting Co., 106 U. S., 447;
Smelting Co. *v.* Kemp, 104 U. S., 636;
Morton *v.* Nebraska, 21 Wall., 660;
S. P. R. R. Co. *v.* Wiggs, 43 Fed. R., 333.

An examination of the land laws further shows the provisions relating directly to contests and which directly authorize the officers of the department to order hearings and determine conflicting questions are confined exclusively to contests where both parties admit the title to be

in the United States and assert simply a preference right to acquire title from the Government.

5 Stat., 456, sec. 11;
11 Stat., 326, sec. 10;
R. S., 2273, 2238;
Chap. 151, 20 Stat., 89;
Chap. 152, 20 Stat., 91;
Chap. 190, 20 Stat., 113;
Chap. 89, 21 Stat., 140.

No statute can be found either authorizing a hearing or contest before the land officers to determine the rights of one who claims, not simply a right to acquire a title which he admits to be in the United States, but that he has already acquired such title or vested interest in the land, or authorizing or empowering such officers to take testimony to assist in the adjudication of such questions. Any such authority upon their part must be based solely upon an implied necessity for it to perform the duties directly imposed upon them. To perform successfully their duties connected with the supervision and disposition of the public land, or the issuance of patents to the railroad company as required by section 4 of the act of July 2, 1864, it is, of course, necessary for them, in the first instance, to determine for themselves what is public land. This question necessarily arises on every application to enter land as a part of the public domain. But since, so far as the railroad grant is concerned, this question can be answered from an inspection of the records [K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640; B. & M. R. R. Co. *v.* Abink (Neb.), 15 N. W., 317], no necessity arises therefrom to order a hearing or cite the company to appear. No other necessity can be suggested for citing the railroad company to appear before the departmental officers, and hence there is no implied authority so to do.

The uselessness of a contest and hearing between the

railroad company and applicant, to enter lands alleged to be public, before the department, is further apparent from the impossibility of such officers rendering a final decision upon any question of fact or law as against one claiming a vested prior right, whether a hearing be had or not. That they can not render such final decision, see:

Iron Silver Min. Co. *v.* Campbell, 135 U. S., 286;
Wright *v.* Roseberry, 121 U. S., 488;
Morton *v.* Nebraska, 21 Wall., 660;
Miller *v.* Tobin (Or.), 16 Pac., 162;
Smith *v.* Ewing, 22 Fed. R., 742;
Wilson *v.* Fine, 40 Fed. R., 52;
Stimson *v.* Clarke, 45 Fed. R., 760;
Megerle *v.* Ashe, 33 Cal., 89.

Third. But even if we concede that otherwise the department might have obtained authority to take the final proof of Bardon, and cited appellee to appear at the hearing by means of a notice, published in accordance with the statute for publishing notices of final proof, yet in this case no jurisdiction was obtained, for notice was not published as required by law.

By act approved March 3, 1879, Congress provides:

"That before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for pre-emption or homestead entries, such persons shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established.

"Upon the filing of such notice, the register shall publish a notice that such application has been made, once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the appli-

cation. At the expiration of said thirty days, the claimant shall be entitled to make proof in the manner provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions."

20 Stat., 472.

It appears from the affidavit of J. Lute Christie [Exhibit "P," Rec., 49 (120)], that the notice was inserted and published "once in each week for five weeks successively; and the notice was first so published on the 6th day of May, 1882, and was last published on the 3d day of June, 1882." From May 6th to June 3d is but twenty-eight days; and such publication is not a compliance with the statutory requirement of publication, "once a week for the period of thirty days."

Fourth. Again, conceding that the department was authorized, notwithstanding the reservation, to take testimony on both sides at the hearing on final proof, for the purpose of ascertaining who had the better right to the land; and conceding that the notice of final proof was sufficient, the failure of the company to appear would not justify the action of the department in awarding the land to the entryman. At most such a failure to appear would amount to a default. Conceding, for the sake of argument, that the company thereby waived all right to deny the facts set up in the proof, and that it must stand upon the case made, still it can not be required to stand upon any other case than that which the whole record *does* make; and if that case is one upon which the company has in law the better right, the judgment should go accordingly, notwithstanding the default. Failure to appear is not a contempt of court to be punished arbitrarily by a forefeiture of rights which even the record made by the other side shows to exist. Nor is the department authorized to declare forfeitures

for any purpose. And since in this case it clearly appears from the departmental records, necessarily a part of Bardon's case, that the land in law belonged to the railroad company, the departmental decisions should have so awarded it. This is now the departmental doctrine; the rule announced by Mr. Muldrow in Exhibit "T," Rec., 52 (127) having been squarely overruled.

Randolph *v.* N. P. R. R. Co., 9 L. D., 416;
Florida Ry. & Nav. Co. *v.* Dodd, 11 L. D., 91;
N. P. R. R. Co. *v.* Harrendrup, 11 L. D., 633;
N. P. R. R. Co. *v.* Harris, 12 L. D., 351.

What we have said effectually disposes of any question that may arise as to the conclusive effect of the patent. The patent is but the judgment of the department; and since it was, in this case, rendered without jurisdiction, it is void and can be attacked even collaterally.

Doolan *v.* Carr, 125 U. S., 618;
Wright *v.* Roseberry, 121 U. S., 488;
Steele *v.* Smelting Co., 106 U. S., 447;
Smelting Co *v.* Kemp, 104 U. S., 636;
Stoddard *v.* Chambers, 2 How., 282.

And since the department can not render a final decision as against one claiming a prior vested right, the railroad company can attack this patent even upon questions of fact.

Iron Silver Min. Co. *v.* Campbell, 135 U. S., 268;
Wright *v.* Roseberry, 121 U. S., 488;
Miller *v.* Tobin (Or.), 16 Pac., 162;
Branch *v.* Mitchell, 24 Ark., 431;
Kernan *v.* Griffith, 27 Cal., 87;
Megerle *v.* Ashe, 33 Cal., 83, 89.

Again, it appears from the record that the action of the department in issuing the patent to Mary Bardon was the result of a misconstruction of the law only, not

of a mistake of fact. [Exhibit "R," Record, 51 (125); Exhibit "T," Record, 52–3 (127–8).]

And it is settled that when the department, by a misapplication of the law to a settled state of facts, deprives a party of that to which he has acquired a right under the sanction of the law, the courts will grant relief in an equitable action.

S. P. R. R. Co. *v.* Dull, 22 Fed. R., 500;
C. M. & St. P. Ry. Co. *v.* S. C. & St. P. R. R. Co., 10 Fed. R., 449;
A. T. & S. F. R. R. Co. *v.* Bobb, 24 Kas., 679;
Emslie *v.* Young, 24 Kas., 739;
Shepley *v.* Cowan, 91 U. S., 340;
Moore *v.* Robbins, 96 U. S., 535.

VII.

The Act of April 21, 1876, is a Curative Act and effects only entries initiated prior to its passage.

By an act entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department," approved April 21, 1876, Congress provided:

"*Be it enacted, etc.*, That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers upon tracts of land not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands were situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead law have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed and patents for the same shall issue to the parties entitled thereto.

"Sec. 2. That when, at the time of such withdrawal as aforesaid, valid pre-emption or homestead claims exist upon any lands within the limits of any such grants which afterwards were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

"Sec. 3. That all such pre-emption and homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proofs required shall entitle the holder of such claim to a patent therefor."

It is contended by appellant that the grant to the Northern Pacific Railroad Company expired July 4, 1880, and that her entry being subsequent to such expiration, is protected by the third section of this act.

An examination of the act shows that it in no wise changes the laws excluding reserved lands from entry under the pre-emption, homestead, and other land laws. Such entries are still prohibited and void as before the passage of the act. And where land has been reserved by act of Congress, as was the land here in controversy, the act of 1876 does not authorize the entry thereof; nor does it authorize the officers of the Interior Department to permit the entries of such reserved lands. The words "all such pre-emption and homestead entries which *may have been made* by permission of the Land Department, or in pursuance of the rules and instructions thereof," obviously do not contemplate the granting of permission by the department to settlers to make future entries upon reserved lands, or authorize those officers to revoke such congressional reservations. The reservations being created

by Congress, can be abrogated only by Congress, and so long as they exist no entry can be made upon the land included therein. And unless the act of 1876 operates to repeal the prior reservations created by section 6 of the Northern Pacific act and similar legislation, it can not have the effect contended for by appellant. Without discussing the question of the power of Congress to repeal section 6 before a breach of the conditions, and after appellee had, upon the faith thereof, expended large sums of money in surveying the general route and preparing maps thereof for filing, we will pass at once to the question as to whether it was the intention of Congress to repeal this section. The act of 1876 contains no words of repeal; and if that act repeals section 6 and similar legislation, it is purely by implication. Such repeals are not favored; and where by a possible construction two affirmative acts may be made to stand together, such construction will be adopted.

Wood *v.* U. S., 16 Pet., 342;
McCool *v.* Smith, 1 Black., 459;
U. S. *v.* Tynen, 11 Wall., 88;
Red Rock *v.* Henry, 106 U. S., 602;
U. S. *v.* Cook Nat. Bank, 9 Biss., 60;
Ex-parte Crow Dog, 109 U. S., 507.

The act of 1876 is susceptible of another construction—a construction giving it full force and effect, and permitting it to stand side by side with prior affirmative statutes creating reservations; a construction in accordance with the plain intent and meaning of the terms used; in accordance with the proper grammatical construction of the language employed; and in accordance with the history of the act; a contemporaneous construction supported by the long-continued usage of the department, viz., that it is a curative act applying only to entries made prior to its passage and confirming them.

By its title the act professes to confirm entries "where such entries *have been made*." The first section speaks of entries made prior to the time notice of withdrawal "*was*" received at the local land office, and of entries after the restoration of the land to market where the pre-emption and homestead laws "*have been*" complied with and proper proofs "*have been made*." The second section speaks only of those cases where lands "*were*" re-entered, and the third section has reference only to entries that "*may have been*" made. Nowhere are future entries referred to. The past tense alone occurs; the present and future are carefully avoided. In other laws, with reference to entries upon reserved lands, careful provision is almost uniformly made for future acts. Sec. 2257, R. S., provides:

"All lands * * * to which the Indian title has been or *may hereafter* be extinguished shall be subject to the right of pre-emption," etc.

Sec. 2280, R. S., provides:

"That any settler on lands heretofore reserved * * * which have been or *may be hereafter* declared * * * invalid shall be entitled to all the rights," etc.

Sec. 2281 provides:

"All settlers on public lands which have been or *may be* withdrawn," * * * etc.

Sec. 2288 provides for

"Any settler who has already settled or *hereafter may* settle on the public lands," etc.

The careful provision for the future in these sections, the equally careful avoidance of such provision in the act of 1876, can only be construed to mean that it was the intent of Congress that the act should apply to the past only. The act was very fully and carefully consid-

ered in the Senate. Its present form was, in fact, as in presumption, the result of careful and painstaking consideration by the legislative department. While the courts have no authority to enforce the correct grammatical use of words upon the Legislature, they have a right to resort to the grammatical structure of the statute as an aid in seeking the thought which it expresses.

The history of the act confirms this construction. As appears from the debates of Congress that history is as follows: Until the appointment of Mr. Delano as Secretary of the Interior the Land Department had uniformly ruled that the rights of the railroads to the lands granted by the various acts of Congress attached when the map of definite location and order of withdrawal were filed in the local land office of the district within which the land was situated. This ruling was reversed by Mr. Delano, who held that the right attached from the time the map of definite route was adopted by the board of directors of the railroad company. Under this ruling, entries made subsequent to the adoption of such line by the board of directors and prior to the filing of any map thereof, prior to the time the settler could possibly have any notice of where the line of route would be, were canceled. The settler was thus deprived of all evidence of title, and could not in the courts maintain an action to protect such rights as he might have. To reach these evils of a past construction the first and second sections were designed. The third section was to relieve settlers from the effects of the ruling in the case of Schulenberg *v.* Harriman, 21 Wall., 44. Prior to that decision the land office had held that after the expiration of the time within which the road was to be completed according to the charter, the lands reverted to the public, and entries were permitted. That decision reversed such rulings, holding that the grants were *in præsenti*, with conditions subsequent; and that the rights of the railroad compa-

nies could only be divested by judicial or legislative proceedings. Under that decision entries that had been permitted by the land department must necessarily have been cancelled; and the intention was to secure those rights by a legislative forfeiture of so much land as had been entered; not to forfeit the entire land grant of even those roads that were then in default, by permitting future entries.

Secretary Schurz, in the case of James Gaffney *v.* C. P. R. R. Co., decided May 22, 1878, L. and R., Record, vol. 24, p. 48, speaking of the third section of the act of April 21, 1876, says: "As to the fourth point, the act confirms only those entries which have been made in good faith prior to its passage."

Secretary Teller, speaking of this section, said:

"The intention of the act is clear. The Schulenberg-Harriman decision was made about a year before said act was passed. It is well known that the land department, before such decision, permitted entries and filings to be freely made upon lands included in railroad grants after the time limited for building the roads expired, where the roads had not been built, upon the theory that the grants had expired by express limitation. Said section 3 confirms 'all such pre-emptions and homestead entries.'"

A. & C. R. R. Co. *v.* Uptain, 11 C. L. O., 237.

And see:

Letter of Commissioner Williamson to the Register and Receiver of the Bozeman Land Office, dated Oct. 12, 1877, 4 C. L. O., 123;

McGrath *v.* A. & P. R. R. Co., 1 L. D., 328;

St. P. M. & M. Ry. Co., 1 L. D., 378;

Daneri *v.* T. & P. Ry. Co., 2 L. D., 459;

C. P. Ry. Co., 2 L. D., 489;

N. P. R. R. Co. *v.* Mansfield, 3 L. D., 303; s. c., 3 L. D., 357;

A. & P. R. R. Co., 16 Op. Atty. Gen., 572.

And since, therefore, the land in controversy was public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights at the time the line of the Northern Pacific railroad was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and since the railroad company is not estopped by its failure to appear and contest the final proof of appellant, and the entry of appellant is not confirmed by the act of April 21, 1876, we respectfully submit that the title to this land vested in the appellee by virtue of the act of Congress, and that the decree of the court below should be affirmed.

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